

No. 12717

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United States  
Court of Appeals  
for the Ninth Circuit.

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E. B. SWOPE, Warden, United States Peniten-  
tiary, Alcatraz, California,

Appellant,

vs.

JOHN MUGAVERO,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

FILED

DEC - 8 1950

PAUL P. O'BRIEN,

CLERK



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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Certificate of Clerk to Record on Appeal.....	125
Designation of Contents of Record on Appeal No. 29753 .....	70
Memorandum Opinion No. 29017-E.....	87
Minute Order Entered June 26, 1950—Order That Case Be Placed on Calendar for July 10, 1950, for Hearing of Motion to Strike, Order of Submission Vacated No. 29753.....	64
Minute Order Entered March 27, 1950—Order Granting Petitioner's Motion for Rehearing No. 29017-E .....	123
Motion to Dismiss Petition for Writ of Habeas Corpus No. 29017-E.....	81
Motion for an Order to Grant a Rehearing in Petition for Writ of Habeas Corpus and to Permit the Filing of Substantiating Evidence No. 29017-E .....	106
Motion for Permission to Supplement Record to a Motion for an Order to Grant Rehearing in Petition for Writ of Habeas Corpus No. 29017-E .....	111
Motion to Strike No. 29753.....	65

INDEX	PAGE
Names and Addresses of Attorneys.....	1
Notice of Appeal No. 29753.....	69
Order Denying Petition for Writ of Habeas Corpus No. 29017-E.....	104
Order Extending Time to Docket No. 29753....	69
Order Granting Respondent Time within Which to File a Return to Order to Show Cause, and Memorandum of Points and Authorities in Support Thereof—No. 29017-E	94
Order Granting Writ No. 29753.....	68
Order re Motion to Strike No. 29753.....	67
Order to Show Cause No. 29017-E.....	80
Order Vacating Order Granting Motion for Re- hearing No. 29017-E.....	124
Petition for Writ of Habeas Corpus No. 29753.	2
Exhibit A—Certified Documents from Cause Numbered C. 116/211...	10
B—Extracts from Testimony in Cause Numbered C. 116/211...	31
Petition for Writ of Habeas Corpus Ad Subjiciendum No. 29017-E.....	73
Petitioner's Traverse to Respondent's Supple- mentary Proceedings No. 29017-E.....	97

INDEX

PAGE

Return to Order to Show Cause No. 29754.....	41
Return to Order to Show Cause No. 29017-E...	94
Statement of Points to Be Relied on in Appeal and Designation of Contents of Record to Be Printed .....	128
Traverse to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus Ad Subjiciendum No. 29017-E.....	82





## NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,  
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Post Office Building,  
San Francisco, California,

Attorney for Respondent and  
Appellant.

MR. MALCOLM T. DUNGAN,

111 Sutter Street,  
San Francisco, California,

Attorney for Petitioner and Appellee.

In the United States District Court, Northern  
District of California, Southern Division

No. 29753

JOHN MUGAVERO,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Peniten-  
tiary, Alcatraz, California,

Respondent.

## PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable the Judges of the United States  
District Court for the Northern District of  
California:

The petition of John Mugavero for a writ of  
habeas corpus respectfully shows:

### I.

Petitioner is a citizen of the United States.

### II.

Petitioner is unlawfully restrained of his liberty  
by respondent E. B. Swope as Warden of the United  
States Penitentiary, Alcatraz, California.

### III.

Petitioner, respondent and the Penitentiary are  
within the Northern District of California.

### IV.

This Court possesses jurisdiction under Const.

U.S. Art. I, Sec. 9, cl. 2 and 28 USCA Secs. 1391(b), 1393(a) and 2241, et seq., to issue the writ hereinafter prayed for.

### V.

Petitioner is held in custody by respondent, as Warden, etc., under color of authority of the United States, that is to say, under a judgment, sentence and warrant of commitment issued out of the District Court of the United States for the Southern District of New York on the 16th day of March, 1944, in a criminal cause numbered C. 116/211 in the files of that Court, and further under a transfer order dated the 27th day of October, 1944, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons, Department of Justice. Certified copies of the judgment, sentence, warrant of commitment and transfer order, together with a certified copy of the indictment in cause numbered C. 116/211, certified copy of election of petitioner to enter upon service of his sentence, certified copy of docket entries in said cause, and copy of Record of Court Commitment No. 642-AZ, United States Penitentiary, Alcatraz, California, are attached hereto, marked "Exhibit A," and made a part hereof.

### VI.

The restraint and custody hereinabove referred to are unlawful and violative of the Constitution of the United States, and particularly of Amendment V thereto, in that petitioner is thereby for the

same offense twice placed in jeopardy as hereinafter more particularly appears.

## VII.

On or about the 30th day of November, 1943, petitioner and certain other persons met near a terminal of the Rapid Motor Lines, Inc., (hereinafter called "Rapid") in the City of New York. There were two loaded trucks inside the terminal. Two employees of Rapid took the two trucks (hereinafter referred to as "Truck 3" and "Truck 4") out of the terminal, parked them in the street and departed. When they returned a few minutes later, they were held up by petitioner and his confederates, taken into the terminal and there bound. Petitioner and his confederates thereupon left the terminal and were immediately arrested by agents of the Federal Bureau of Investigation.

## VIII.

Accompanying petitioner and his confederates at the times referred to in Paragraph VII hereof was one James Stegman. Stegman was then and there a paid informer for the Federal Bureau of Investigation. While petitioner and his confederates were taking the two employees of Rapid into the terminal, Stegman entered Truck 3, drove it away and reported to the agents of the Federal Bureau of Investigation.

## IX.

The part of Truck 4 designed for carrying merchandise and which did carry merchandise was

entirely locked, covered and sealed and all the merchandise upon said truck was under cover, lock and seal at all times referred to in this and the two foregoing paragraphs. Neither petitioner nor any of his confederates ever at any time approached, touched or entered Truck 4; nor did any of them take possession thereof or assume control thereover in any manner or form, except so far as they did so by holding up and binding the driver thereof.

### X.

The merchandise on Truck 3 consisted in part of 590 cases of Park & Tilford liquors, the property of Park & Tilford Import Corporation. The merchandise on Truck 4 consisted in part of 415 cases of Park & Tilford liquors, the property of Park & Tilford Import Corporation. Truck 4 also contained vermouth, sherry, muscatel, tomato puree and Marsalla Tonic, the property of various persons. The facts alleged in this paragraph appear in the record of said cause numbered C. 116/211 by extracts from the testimony of a witness for the United States, certified copy of which is attached hereto, marked "Exhibit B" and made a part hereof, and these facts have never been controverted, contradicted, questioned or denied by any party to said cause numbered C. 116/211 or any of the later proceedings arising out of it, except that upon the appeal in said cause the Circuit Court of Appeals did not understand them to be the facts, due to an inadvertent statement in the brief of counsel.

## XI.

On or about January 12, 1944, an indictment was filed against petitioner and his confederates in the United States District Court for the Southern District of New York arising out of the matters aforesaid. The indictment was in nine counts and is a part of Exhibit A hereto. The first count charged the theft from "certain trailer trucks" of 1005 cartons of Park & Tilford liquors and certain advertising matter. That is, the first count embraced the 590 cases of whiskey on Truck 3, plus the 415 cases on Truck 4. The second count covered certain other merchandise on Truck 3. The third through eighth counts, inclusive, charged various other thefts "from a certain trailer truck"; they covered the other merchandise on Truck 4. The ninth count was a count for conspiracy to commit the acts charged in the first eight counts.

## XII.

Thereafter petitioner and his confederates were tried and found guilty on all nine counts.

## XIII.

Petitioner was sentenced to serve five years' imprisonment on the first and second counts, said sentences to run concurrently. Petitioner was sentenced to serve five years' imprisonment on the third through eighth counts, inclusive, said sentences to run concurrently, but consecutively to the sentences on the first two counts. Petitioner was sentenced to serve two years' imprisonment on the ninth count,

to run consecutively to the sentences on the prior counts. The sentences totaled twelve years.

#### XIV.

The aforesaid sentences on the third through eighth counts, inclusive, were and are unlawful, void and violative of the Constitution of the United States, and particularly Amendment V thereto, in this, that petitioner by the sentence imposed on the first count was punished for stealing merchandise contained in both Truck 3 and Truck 4; that if petitioner stole the merchandise in Truck 4 at all, he did so merely by participating in holding up and binding the driver thereof and not otherwise; that the same was one indivisible and inseparable transaction; that if the same was an offense at all, it was but one offense, for which petitioner was punished by the sentence on the first count; that by being subjected to an additional sentence on the third through eighth counts, petitioner was twice placed in jeopardy for the same offense.

#### XV.

The legal portion of petitioner's sentence was seven years. Petitioner entered upon the service thereof on March 16, 1944. Petitioner is eligible for 10 days' good time per month, as appears by the Record of Court Commitment which is a part of Exhibit A hereto. Petitioner earned all the good time which it was possible for him to earn, namely 840 days. Petitioner's sentence was inoperative for 44 days. Petitioner accordingly completed the service of his sentence on January 8, 1949.



## XVI.

Ever since January 8, 1949, the restraint of petitioner by respondent has been and it is now illegal, unconstitutional and void, and petitioner is entitled to immediate release.

## XVII.

On the 30th day of November, 1947, Joseph Peter Oddo, one of petitioner's confederates in the transaction out of which his conviction arose, and one of his codefendants in said cause numbered C. 116/211, and who received a sentence similar to petitioner's, filed a motion in the United States District Court for the Southern District of New York under Rule 35 of the Federal Rules of Criminal Procedure to correct said unconstitutional sentence, as required by 28 USCA Sec. 2255, based upon the grounds hereinbefore alleged. Said motion was denied by that Court and the order denying the same was affirmed by the United States Court of Appeals for the Second Circuit. Such a motion by petitioner would be inadequate and ineffective to test the legality of petitioner's detention.

## XVIII.

Heretofore and on July 20, 1949, petitioner filed in this Court his petition for Habeas Corpus based upon the same grounds hereinbefore alleged. After various proceedings thereafter taken and had said petition was finally denied on May 10, 1950, by the Honorable Herbert W. Erskine, a Judge of this Court, upon the ground that a certified copy of the record in case numbered C. 116/211 establishing the



facts alleged in paragraph X hereof was not attached to the petition therein. Said denial was without prejudice to the filing of a new petition containing such record, which is Exhibit B hereto.

Wherefore, petitioner prays that a writ of habeas corpus issue out of this court, directed to said E. B. Swope, Warden, etc., commanding him to produce the body of petitioner before this Court at a time and place therein to be specified, then and there to receive and do what the Court shall order concerning the unlawful detention and restraint of petitioner, and that petitioner be ordered discharged from the restraint and imprisonment aforesaid.

Dated: May 15, 1950.

/s/ MALCOLM T. DUNGAN.

United States of America,  
Northern District of California,  
City and County of San Francisco—ss.

Malcolm T. Dungan, being first duly sworn, deposes and says that he is the attorney for John Mugavero, the petitioner named in and who makes the foregoing Petition for Writ of Habeas Corpus; that he makes this verification on behalf of petitioner as permitted by 28 USCA Sec. 2242; that he prepared the foregoing Petition and knows the contents thereof; that the facts stated therein are true; that he has no personal knowledge of the facts therein stated, except the fact that petitioner is detained as a prisoner at the U. S. Penitentiary,

Alcatraz, California; that the sources of his knowledge upon the other facts therein stated are official records of the District Court of the United States for the Southern District of New York, official reports of the United States Court of Appeals for the Second Circuit, and a petition heretofore filed by petitioner in this Court and verified by petitioner; that this verification is made by him and not by petitioner for the reason that petitioner's detention would delay the verification and filing thereof, and that petitioner has been for a long time unjustly detained and is entitled to the writ with all convenient speed.

/s/ MALCOLM T. DUNGAN.

Subscribed and sworn to before me this 15th day of May, 1950.

[Seal] /s/ EUGENE P. JONES,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires December 29, 1951.

Exhibit A

Form No. 110

United States of America,  
Southern District of New York—ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate to wit, Judgment and Commitment in the case of the United States vs.

John Mugavero, have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 30th day of September in the year of our Lord one thousand nine hundred and forty-nine and of the Independence of the United States the one hundred and seventy-fourth.

[Seal]      /s/ WILLIAM V. CONNELL,  
Clerk.

District Court of the United States  
Southern District of New York

C. 116/211

Violation of U.S.C. Title 18 Secs. 409 & 88

Theft of Merchandise Moving in Interstate  
Commerce and Conspiracy

UNITED STATES OF AMERICA

vs.

JOHN MUGAVERO

### JUDGMENT AND COMMITMENT

On this 16th day of March, 1944, upon the proceedings heretofore had herein and on motion of the United States Attorney, It Is by the Court

Ordered and Adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of Five Years on counts 1 & 2 to run concurrently.

Five Years on each of counts 3 to 8 inclusive to run concurrently, and consecutively to sentence on counts 1 & 2. Prison sentence on counts 3 to 8 to follow sentence on counts 1 & 2.

Two Years on count 9 to run consecutively to sentence on counts 3 to 8. Prison sentence on count 9 to follow sentence on counts 3 to 8.

Total Sentence—Twelve Years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ SIMON H. RIFKIND,

United States District Judge.

A True Copy. Certified this 16th day of March, 1944.

[Seal] /s/ GEORGE J. H. FOLLMER,  
Clerk.

#37-289

Return

I have executed the within judgment and commitment in the manner following: On March 16, 1944, I delivered said John Mugavero to the Warden of Detention Headquarters temporarily pending transfer to the institution herein designated for the service of sentence; and on Aug. 30th, 1944, I delivered said John Mugavero to the Warden at U. S. Pen., Atlanta, Ga., the institution designated, together with certified copy of the within Judgment and Commitment.

/s/ JAMES E. MULCAHY,  
U. S. Marshal.

[Seal] By /s/ JOHN O. PICKETT,  
Deputy.

Filed: Sept. 13, 1944, U. S. District Court S. D.  
of N. Y.

United States of America,  
Southern District of New York—ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate, to wit: the docket entries in the case of the United States vs. Kingdon William DeNormand, have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the Seal of the said Court at

the City of New York, in the Southern District of New York, this 30th day of September, in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States the One Hundred and Seventy-fourth.

[Seal]      /s/ WILLIAM V. CONNELL,  
Clerk.

United States District Court

Docket C 116/211

THE UNITED STATES

vs.

KINGDON WILLIAM De NORMAND, Alias  
WILLIE DESMOND, Alias ROBERT L.  
LONG, JOSEPH PETER ODDO, alias AN-  
THONY J. DONATO, JOSEPH ALFRED  
LA CASCIA, WILLIAM JOSEPH KING,  
Alias KING and JOHN MUGAVERO.

VIOLATION OF THEFT OF MERCHANDISE  
MOVING IN INTERSTATE COMMERCE  
AND CONSPIRACY

Title 18, Sec. 409 and 88 U.S.C.

CRIMINAL DOCKET

Proceedings

1943

Dec. 14—Filed Notice of Appearance. Jacob M. Of-  
fenhinder, Atty. for Jos. Oddo.

1944

Jan. 12—Filed Indictment.

1944

- Jan. 14—All five defendants Pleads Not Guilty.  
Bails \$20,000 as to each. Remanded.  
Jacob M. Offenhinder assigned as counsel  
to defts. La Cascia and King. Goddard, J.
- Jan. 31—Henry K. Chapman assigned as atty. for  
deflt. Kingdon W. De Normand. Leibell, J.
- Feb. 10—Filed Notice of Appearance. Morris D.  
Reiss, Atty. for John Mugavero.
- Mar. 6—Filed substitution of Morris E. Packer as  
Atty. for deflt. Kingdon William De Nor-  
mand. So ordered. Follmer, Clerk.
- Feb. 29—Trial begun as to all defendants before  
Hon. Simon H. Rifkind, J.
- Mar. 1—Trial continued.
- Mar. 2—Trial continued.
- Mar. 3—Trial continued.
- Mar. 6—Trial continued.
- Mar. 7—Trial continued. Govt. Rests.  
Defts. De Normand and Mugavero move  
to dismiss each of counts 1 to 9, inclusive.  
Denied Exc.  
Defts. Oddo, King and La Cascia move  
for dismissal of the indictment. Denied  
Exception.
- Mar. 8—Trial continued.
- Mar. 9—Trial continued and concluded. All de-  
fendants renew motions for the dismissal  
of the indictment and for a direction of a  
verdict in their favor. Denied exc.  
Verdict—All defendants Guilty as charged.  
3/16/44 for sentence. Defendants re-  
manded. Rifkind, J.



1944

- Mar. 16—Motions as to all defendants. Motion to set aside verdict Denied Exc. Motion in arrest of Judgment Denied Exc.
- Mar. 16—Filed Judgment. Kingdon William De Normand. Sentenced to Ten (10) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concurrently with each other but consecutively to and to follow sentence on counts 1 and 2; Two (2) years on count 9 to run consecutively to and follow sentence on counts 3 to 8 inclusive. Sentence to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.
- Mar. 16—Filed Judgment—John Mugavero—Sentenced to Five (5) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concurrently with each other but consecutively to and begin after sentence on counts 1 and 2; Two (2) years on count 9 to run consecutively to and begin after sentence on counts 3 to 8 inclusive. Sentences to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.
- Mar. 16—Filed Judgment—William Joseph King—Sentenced to Five (5) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concur-



1944

rently with each other but consecutively to and begin after sentence on counts 1 and 2; Two (2) years on count 9 to run consecutively to and begin after sentence on counts 3 to 8 inclusive. Sentences to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.

Mar. 16—Filed Judgment—Joseph Alfred La Cascia—Sentenced to Five (5) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concurrently with each other but consecutively to and begin after sentence on counts 1 and 2; Two (2) years on count 9 to run consecutively to and begin after sentence on counts 3 to 8 inclusive. Sentences to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.

Mar. 16—Filed Judgment—Joseph Peter Oddo—Sentenced to Ten (10) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concurrently with each but consecutively to and begin after sentence on counts 1 and 2; One Year and One Day on count 9 to run concurrently with sentence on counts 3 to 8 inclusive. Sentence to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.

1944

- Mar. 16—Issued committment in triplicate as to all five defendants.
- Mar. 20—Filed Notice of Appeal by Kingdon William De Normand—(M.E.P.)
- Mar. 20—Filed Notice of Appeal by Joseph Peter Oddo, Joseph A. La Cascia, William J. King and John Mugavero—(M.D.R.)
- Mar. 21—Filed Remand (5) Jos. L. La Cascia, K. Wm. De Normand, Wm. Jos. King, John Mugavero, Jos. P. Oddo dated 1/14/44—Rifkind, J.
- Apr. 17—Filed stipulations extending times of Kingdon William De Normand, Joseph Peter Oddo, Joseph Alfred La Cascia, William Joseph King and John Mugavero to serve and file bill of exceptions etc. and extending term of Court to and including July 15, 1944. So ordered. Rifkind, J.
- May 5—Filed elections to begin service of sentence by defendants John Mugavero and William Joseph King dated 5/4/44
- May 9—Filed election to begin service of sentence by deft. Joseph Alfred La Cascia 5/7/44
- May 29—Filed stipulation consolidating appeals by defts.-appellants J. P. Oddo, J. A. La Cascia, W. J. King and J. Mugavero and that appeals be porsecuted upon one record and brief. So ordered. Rifkind, J.
- June 15—Filed a true copy of Order of C.C.A. remanding this cause to District Court for the purpose of moving for a new trial. A. Bell, Clerk.

1944

- June 22—Filed stipulation extending of Kingdon William De Normand, Joseph Peter Oddo, Joseph Alfred La Cascia, William Joseph King and John Mugavero to serve and file bill of exceptions etc. to and including 10/1/44. So ordered. A. N. Hand, C.J.
- June 26—Filed Order extending Term of Court to and including the 16th of August, 1944. Rifkind, J.
- June 29—Filed affidavits and notice of motion for an order setting aside judgment of conviction and granting a new trial as to defts. De Normand, Oddo, La Cascia, King and Mugavero—memo endorsed—Argued on 6/23/44. Motion denied 6/29/44. Rifkind, J.
- June 29—Filed exhibits and transcript of testimony of James Stegman
- June 29—Filed affidavit of John C. Hilly in opposition for motion for new trial
- July 14—Filed Order denying motion for a new trial. Rifkind, J.
- July 17—Filed Notice of Appeal as to Kingdon William De Normand, Joseph Peter Oddo, Joseph Alfred La Cascia, William Joseph King and John Mugavero.
- July 27—Filed notice by Joseph P. Oddo dated 7/23/44 electing to enter upon service of sentence.
- Aug. 7—Filed affidavit and Notice of Motion for an order extending term of Court to Dec.

1944

- 1, 1944—memo endorsed. So ordered.  
Rifkind, J.
- Aug. 21—Filed notice by Joseph Alfred La Cascia dated 8/16/44 electing to enter upon service of sentence.
- Aug. 21—Filed notice by William Joseph King dated 8/16/44 electing to enter upon service of sentence.
- Aug. 21—Filed notice by John Mugavero dated 8/16/44 electing to enter upon service of sentence
- Aug. 21—Filed stipulation extending time of Kingdon W. De Normand, Joseph P. Oddo, Joseph A. La Cascia, William J. King and John Mugavero to settle and file bill of exception etc. to and including Oct. 1, 1944. So ordered. A. M. Bell, Clerk, C.C.A.
- Aug. 23—Filed Commitment & entered return Defendant Joseph P. Oddo delivered to the U. S. Pen., Atlanta, Ga., on Aug. 9, 1944.
- Sept. 13—Filed Commitment & entered return Defendant Alfred La Cascia delivered to the U. S. Pen., Atlanta, Ga. 8/30/44
- Sept. 13—Filed Commitment & entered return Defendant John Mugavero delivered to the U. S. Pen., Atlanta, Ga. 8/30/44
- Sept. 13—Filed Commitment & entered return Defendant William Joseph King delivered to the U. S. Pen., Atlanta, Ga. 8/30/44
- Sept. 26—Filed Order extending time of K. W. De Normand, J. P. Oddo, J. A. La Cascia,

1944

W. J. King & J. Mugavero to settle & file bill of exceptions etc. to and including Nov. 1, 1944. A. M. Bell, Clerk, C.C.A.

Oct. 10—Filed assignment of errors.

Oct. 25—Filed Stipulation extending time of K. W. De Normand, J. P. Oddo, J. A. La Cascia, W. J. King and J. Mugavero to settle & file bill of exceptions etc. to and including Dec. 1, 1944. So ordered. A. M. Bell, Clerk, C.C.A.

Nov. 15—Filed Bill of Exceptions

Nov. 15—Certified record on appeal to C.C.A. (M.D.R.)

Nov. 27—Motion to extend Term of Court—as to Defts. Oddo, La Cascia, King & Mugavero. Memo Endorsed. So Ordered. Rifkind, J. Term of Court extended to 4/1/45)

Dec. 2—Filed order extending term of Court as to all Defts. to and including April 1, 1945. Rifkind, J.

1945

Mar. 23—Filed affidavit and Notice of Motion for an order extending term of court as to defts. Oddo, La Cascia, King & Mugavero. Memo endorsed—3/19/45. Referred to Judge Rifkind—Case J.

Mar. 23—Filed order extending term of court to and including Oct. 20, 1945. Rifkind, J.

June 5—Filed two eltters to Judge Rifkind dated 10/10/44 & 5/16/45 from Kingdon de Normand.

June 5—Filed opinion #15944—motion for new

1945

trial & modification of sentence—denied.  
Rifkind, J.

June 16—Mandate C.C.A. Judgment of District Court is affirmed as to Kingdon, Wm. De Normand, Joseph Peter Oddo, Joseph Alfred La Cascia, Wm. Joseph King and John Mugavero

June 22—Filed Order on Mandate with Notice of Settlement Mandate of Circuit Court of Appeals order to be made Judgment of District Court. Bright, J.

July 18—Filed Commitment & entered return Defendant Kingdon W. De Normand delivered to the U. S. Penitentiary, Leavenworth, Kansas, on July 6, 1945.

1946

May 23—Filed petition and notice of motion for Writ of Habeas Corpus for Kindon de Normand and motion to set aside verdict memo endorsed—5/10/46—application for Writ of Habeas Corpus is denied. Knox, J.—5/23/46—motion to set aside verdict denied. Mandelbaum, J.

May 23—Filed affidavit in opposition

May 29—Filed Transcript of record of proceedings, dated 5/15/46

July 23—Filed petition and notice of motion for a new trial by Kingdon De Normand—memo endorsed — motion denied — Knox, J.—7/23/46. And Petition for Writ of Habeas Corpus—memo endorsed—Petition denied 7/23/46. Knox, J.



1947

Sept. 26—Filed petition for motion for a new trial by Kingdon de Normand—memo endorsed—motion denied. Memo filed. Stephen W. Brennan, U.S.D.J. 9/23/47

Sept. 26—Filed affidavit in opposition.

Sept. 26—Filed memo decision (opinion) #17127 by Brennan, J.

Filed motion for new trial by Kingdon de Normand denied 9/24/47

1948

Mar. 1—Filed supplementary motion by Kingdon de Normand to a motion for a new trial

Mar. 1—Filed affidavit by John Helly, Asst. U. S. Atty., in opposition.

Mar. 9—Filed opinion #17358—denying motion by Kingdon De Normand for a new trial. Goddard, J.

Mar. 15—Filed letter dated 11/30/47 and reply dated 12/4/47.

Mar. 15—Filed petition & Notice of Motion by Joseph Peter Oddo to vacate Judgment and Sentence under counts three to eight—memo endorsed—motion denied. Goddard, J.

Mar. 15—Filed affidavit in opposition.

Apr. 7—Filed Notice of Appeal by J. P. Oddo from denial of motion 3/15/48.

Mailed notices to Warden—Det. Hdqtes. N.Y.C. & Marshal.

Apr. 7—Filed Notice of Appeal by Kingdon de

1948

Normand et al. from denial of motion 3/9/48—mailed notices to Warden—Det. Hdqtes. N.Y.C. & U. S. Marshal (S.D. N.Y.)

Apr. 27—Filed affidavit for allowance of records en forma pauperis by Joseph P. Oddo—allowed 4/26/48. Goddard, J.

May 12—Filed order extending time to file record on appeal as to Joseph P. Oddo et al. to May 28, 1948. Hulbert, J.

Apr. 12—Filed notice for motion to C.C.A. to consolidate appeal herein (J. P. Oddo) with printed record that remains among files of Clerk of C.C.A. in U. S. v. K. W. De Normand et al. #256. (Docketed May 25, 1948)

Apr. 12—Filed praecipe for transcript of record (J. P. Oddo) (Docketed May 25, 1948)

May 27—Certified record on appeal delivered to C.C.A. Oddo & De Normand appellants

June 7—Filed copy of order C.C.A. for leave to file record of Kingdon de Normand made up of the original papers & 3 typewritten copies of the brief on or before 8/1/48 & further permitting Marshall Jacobs, Esq., to withdraw as assigned counsel. A. M. Bell, Clerk, C.C.A.

June 7—Filed copy of order C.C.A. denying petition of Kingdon de Normand for Writ of Habeas Corpus. A. M. Bell, Clerk, C.C.A.

Sept. 24—Certified Sup. Record to C.C.A. (Oddo).



1949

Jan. 24—Filed Mandate of C.C.A.—Orders of District Court as to Joseph P. Oddo & Kingdon de Normand are affirmed.

Mar. 1—Filed Notice of Settlement and Order on Mandate—Mandate of C.C.A. filed Jan. 24, 1949, made Judgment of District Court. Clancy, J.

Mar. 1—Filed letter from Kingdon De Normand dated 2/19/49.

Aug. 23—Filed motion of Deft. De Normand to annul, vacate and set aside, unjust, unlawful, unauthorized Trial Court Proceedings, pursuant to the provisions of Sec. 2255 Title 28 U.S.C.A.

United States of America,  
Southern District of New York—ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate, to wit: to elect to enter for sentence in the case of the United States vs. John Mugavero, have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 30th day of September,

in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States the One Hundred and Seventy-fourth.

[Seal]      /s/ WILLIAM V. CONNELL,  
Clerk.

The United States District Court for the  
Southern District of New York

C. 116/211

UNITED STATES OF AMERICA

vs.

JOHN MUGAVERO.

I hereby elect to enter upon service of my sentence of 12 years, in such institution as shall be designated by the Attorney General for such service. It is understood that this election precludes release on bail.

/s/ JOHN MUGAVERO.  
(Signature)

Date: August 16th, 1944.

/s/ J. A. COHN,  
Record Clerk.  
(Witness)

Administrative Form No. 66

November, 1938

(Copy)

Department of Justice

Washington

October 27, 1944

To the Warden, United States Penitentiary, Atlanta,  
Georgia:

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of John Mugavero, #64394, from the United States Penitentiary, Atlanta, Georgia, to the United States Penitentiary, Alcatraz, California.

Now Therefore you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him

to safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General,

JAMES V. BENNETT,

Director, Bureau of Prisons.

/s/ FRANK LOVELAND,

Assistant Director.

Closer custody.

Original—To be left at institution to which prisoner is transferred.

(A True Copy)

By /s/ C. W. SUNDSTROM,

Record Clerk, USP, Alcatraz,  
Calif.

July 26, 1949  
Record of Court Commitment  
Department of Justice  
Penal and Correctional Institutions  
United States Penitentiary  
Alcatraz, California

A True Record:

/s/ C. W. SUNDSTROM,  
Record Clerk, Alcatraz.

July 26, 1949.

No. 642-AZ.

Inst. Name: John Mugavero.

Alias: John Mugovero. Color: White. Age: 35  
(8-3-13).

True Name: John Mugavero.

Name and number of prior commitments to Fed.  
Inst.: 64394-A (instant case).

Offense: Conspiracy and Stealing Interstate Ship-  
ment—U.S.C. T. 18, Secs. 409, 88.

District: S—New York, N. Y.—Cr. 116/211.

Judge: Simon H. Rifkind.

Sentence: 12 Years (Counts 1 to 9).

Costs Fine: None.

Sentenced: March 16, 1944.

When arrested: Dec. 1, 1943.

Committed to Fed. Inst.: Aug. 30, 1944—Atlanta.

Where arrested: New York City.

Sentence begins: March 16, 1944.\*

Residence: Brooklyn, N. Y.

Eligible for parole: April 28, 1948.

Time in jail before trial: Since arrest.

Eligible for conditional release with good time:

May 19, 1952.\*

Rate per mo. good time: 10.

Total good time possible: 1440 days.

Eligible for con. rel. with extra good time: April  
25, 1952 (24 days indus. g.t. earned to July 26,  
1949).

Forfeited good time:

Amount forfeited:

Restoration good time:

Amount restored:

Expires full term: April 28, 1956.\*

### Former Commitments on Sentence to Other Institutions

No. 88287, State Prison, Ossining, N. Y.

### Action of Board

Date: 3-48. No. app. xxx.

Releases and recommitments on present sentence  
other than parole: 11-7-44, trans. to Alcatraz.

### Statistics Tabulated

Census Bureau

Bureau of Prisons

Detainer: Wanted for Parole Violation as #23672  
—Clinton New York State Div. Parole, Albany,  
N. Y. (Warrant on file.)

---

\*Note: 3-20-44 appeal filed; 5-4-44 elected to  
serve sentence.

\*(Sentence inoperative 44 days while on appeal.)

\*Served 5 days prior to filing of appeal.

Exhibit B

to show these two exhibits to the jury.

The Court: You may do that.

(Exhibits handed to the jury by Mr. Hilly.)

The Court: Counsel may inquire.

Mr. Packer: No questions, if your Honor please.

The Court: No cross. You are excused.

(Witness excused.)

Mr. Hilly: Mr. Roche.

MARTIN ROCHE

called as a witness on behalf of the Government,  
being duly sworn, testified as follows:

Direct Examination

By Mr. Hilly:

Q. What is your occupation, Mr. Roche?

A. I am a dispatcher.

Q. By whom are you employed?

A. Rapid Motor Lines.

Q. And where is the Rapid Motor Lines located?

A. 229 Tenth Avenue, New York City.

Q. Between what streets is that, Mr. Roche?

A. 23rd Street and 24th.

Q. Pardon me?

A. 23rd Street and 24th on Tenth Avenue.

Q. On what side of the avenue?

A. On the downtown side of the avenue.

The Court: You mean on the west side of the  
avenue?

The Witness: On the west side of the avenue.

Q. Has the Rapid Motor Lines any other terminal in New York?

A. No other terminal. That is the only terminal.

Q. I show you this sheet of paper and ask you if you can tell me what that is (handing to witness.)

A. That is a manifest that I made up of the loads on the trucks that left our terminal that day.

Q. Is this paper in your handwriting?

A. In my handwriting.

Q. It is a record kept by your company in the regular course of business?

A. That is right.

Q. How is this record prepared, in duplicate or triplicate?

A. In duplicate form.

Q. Pardon me?

A. In duplicate form.

Q. Is this the duplicate or the original?

A. That is the duplicate.

Mr. Hilly: Will you mark this for identification, please.

(Marked Government's Exhibit 17 for identification.)

Q. Will you tell me, sir, what is the procedure with respect to the original of this manifest?

A. The original of that manifest goes on the truck that leaves our terminal for New Haven.

Q. And the duplicate?

A. And the duplicate is kept in the office in New York City.

Q. When is this manifest prepared, Mr. Roche?

A. At what time?

Q. Yes.



A. That was prepared at 5 o'clock on that respective date.

Q. And what date was that, sir (handing to witness)? A. November 30, 1943.

Q. Is it prepared before or after the trucks leave your terminal? A. Before.

The Court: Were these prepared before these particular trucks left the terminal?

The Witness: Yes, sir.

Mr. Hilly: If your Honor pleases, at this point the Government would like to offer in evidence Government's Exhibit 17 marked for identification.

Mr. Packer: If your Honor pleases, on behalf of all the defendants I object to the introduction of Government's Exhibit 17 for identification on the ground that the offered exhibit is incompetent, irrelevant, no proper foundation has been laid for the introduction thereof, and on the further ground that the said exhibit is hearsay.

The Court: I will examine it.

(Exhibit handed to the Court by Mr. Hilly.)

The Court: Mr. Witness, what are the figures supposed to represent?

The Witness: Those figures are the amount of cases that were on the truck.

The Court: I see. When you say "50" you mean 50 cases?

The Witness: 50 cases, yes, sir.

The Court: And the first column represents the name of the shipper?

The Witness: That is right.

The Court: The second column represents the name of the consignee?

The Witness: Right.

The Court: And the last column represents the quantity of cases?

The Witness: That is right.

The Court: Mr. Hilly, do these names and amounts tie in with the other exhibits?

Mr. Hilly: If your Honor will permit me to proceed with the examination, I will withdraw the offer for the moment.

The Court: I don't keep in mind the figures with respect to the other exhibits. I do not know whether this is the same or at least whether there is a circumstance from which an inference is possible that it is the same one.

Mr. Hilly: I will proceed further and withdraw the offer at this time.

The Court: If you wish.

Mr. Hilly: Yes.

The Court: If you tell me that——

Mr. Hilly: I will tell you that they do represent the same.

The Court: The same names and the same quantity?

Mr. Hilly: Yes, your Honor.

The Court: I will allow it. I will overrule the objection.

(Government's Exhibit 17 for identification received in evidence.)

Q. Mr. Roche, from what is Government's Exhibit 17 in evidence prepared (handing to witness)?

A. From the original bills of lading that were received from the consignor.

Q. I show you Government's Exhibit 7 in evidence, Government's Exhibit 9 in evidence, Government's Exhibit 12 in evidence, Government's Exhibit 14 in evidence, and Government's Exhibit 16 in evidence, and ask you are those the invoices from which you prepared Government's Exhibit 17 in evidence (handing to witness)?

A. That is the exact ones.

Q. And from whom did you receive Government's Exhibits 7, 9, 12, 14 and 16 in evidence?

A. From the consignors, from their shipping departments.

Q. What was the procedure with respect to these five exhibits?

A. Our truck went there and picked up that stuff, checked it on the truck, so that everything was all right and then received these shipping orders from the shipping department or the shipping clerk. Our driver signed for them and brought the original copies back to us.

Mr. Reiss: I move to strike all that out, if the Court please. The best proof is to bring the truckman.

The Court: Yes. The motion will be granted. The jury will disregard the last answer.

Q. (By The Court): You started to tell us what you looked at when you prepared the manifest, Exhibit 17. What papers and what articles, if any?

A. The papers that were shown to me here, which were the shipping orders.

Q. Exhibits 7, 9, 12, 14 and 16? A. Yes.

Q. Did you look at any merchandise?

A. Yes, the merchandise too.

Q. To see whether the merchandise represented on those papers was the same?

A. That is right.

Q. When you wrote down that you were putting 50 cases of a certain brand of whiskey on the truck you made sure there were 50 cases of such whiskey on that truck? A. That is right.

Q. And then you prepared your manifest?

A. That is right.

Q. That was your duty? A. Yes, sir.

Q. In the regular course of your occupation?

A. That is right, sir.

The Court: All right.

Q. (By Mr. Hilly): As a matter of fact, Mr. Roche, with respect to Exhibit 14 in evidence what did you do (handing to witness)?

A. The Park & Tilford's?

Q. Yes.

A. I went to Park & Tilford myself with the driver and helped him load this truck. I signed for the load myself.

Q. You personally checked it onto the truck?

A. Personally checked it onto the truck.

The Court: That is not the truck that goes to New Haven; that takes it to your terminal, is that right?

The Witness: That takes it to our terminal and I there put seals on it, locked it up, and the night

driver comes and takes that same truck to New Haven.

The Court: I see.

Q. With respect to the merchandise as represented by Government's Exhibit 14 in evidence, after it was taken to the terminal what was the procedure?

A. The manifest was made up, I put seals on the truck, sealed both doors and put the Babaco System alarm on it.

Q. Did all of the merchandise as represented by Government's Exhibit 14 in evidence—was that placed on one truck?

A. That was placed on—part on one truck and part on another truck.

Q. And what were the numbers of the trucks on which it was placed?

A. Well, there is 415 of that placed on box No. 4.

Q. By "box No. 4" you have reference to a truck?

A. That is right; that is the trailer box—the number of the trailer.

Q. Yes?

A. And on No. 3 there were 590 put on that one.

The Court: 590 what?

The Witness: 590 cases of whiskey.

The Court: Truck No. 4 and truck No. 3, is that what you told us?

The Witness: That is right.

Q. With respect to the merchandise as represented by Government's Exhibit 7 in evidence, what

was the number of the truck or trucks on which that merchandise was placed?

A. That merchandise was placed on truck No. 4.

Q. And with respect to the merchandise as represented by Government's Exhibit 9 in evidence on what truck or trucks was that merchandise placed?

A. That was placed on box No. 4.

Q. And with respect to the merchandise represented by Government's Exhibit 12 in evidence what truck or trucks was that merchandise placed on (handing to witness)?

A. That was placed on box No. 4.

Q. And with respect to the merchandise as represented by Government's Exhibit 16 in evidence on what truck or trucks was that placed (handing to witness)?

A. That was placed on box No. 3.

Q. In other words, then, in the course of your duties as dispatcher——

The Court: You left out No. 14.

Mr. Hilly: I am sorry, sir.

Q. With respect to Government's Exhibit 14 in evidence what truck or trucks was that merchandise placed on?

A. There were 590 cases of that put on box No. 3 and 415 cases put on box No. 4.

Q. Then after the trucks have been loaded what is the next step that is taken, Mr. Roche?

A. They are brought into the terminal.

Q. Yes.

A. The manifest is made up; I place seals on the doors.

The Court: Don't tell us what you normally do. What did you do on this particular occasion?

The Witness: That is what I did on that particular occasion.

The Court: You put seals on the doors of the truck?

The Witness: Yes, on only one box, on box No. 4.

The Court: You put seals on box No. 4?

The Witness: Yes, sir.

Q. Did you put seals on box No. 3?

A. No, there were no seals put on box No. 3. There cannot be put any seals on that because it has no doors on the back.

The Court: What is it, an open truck?

The Witness: It is a canvas top with a canvas back.

Q. The sides of it are——

A. The sides of it are corrugated.

Q. And the canvas is on top?

A. And the canvas is on top and back.

The Court: Then you told us something about an alarm system.

The Witness: Babaco Alarm System is turned on box No. 4.

Q. What do you then do with respect to Government's Exhibits 7, 9, 12, 14 and 16 in evidence and the original copy of Government's Exhibit 17 in evidence (handing to witness)?

A. They are wrapped all together with a band on them and put on the seat on one of the trucks. That night it was put on box No. 4.

Q. What time do you leave the terminal?



A. Anywhere between 5 and 8.

The Court: What about November 30th? That is the time we are talking about. What time did you leave that night?

The Witness: November 30th, it was about 5:30.

The Court: P.M.?

The Witness: P.M.

Q. Are you the last person to leave the terminal?

A. I am the last person.

Q. What did you do when you left the terminal?

A. I pull the big door down in the front, put the burglar alarm system on and then go out by the small door and lock that one.

Q. Now with respect to box No. 3 and box No. 4, if you know, what was to be the disposition of those two boxes on November 30th?

A. Those two boxes were (End Roche-Direct)

United States of America  
Southern District of New York

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 60 to 70, inclusive, contain true and complete copies of originals thereof on file in said Court, in the case of United States of America, Plaintiff-Appellee, against Kingdon William DeNormand, etc., Joseph Peter Oddo, etc., Joseph Alfred La Cascia, William Joseph King, etc., and John Mugavero, Defendants-Appellants, as the same remain of record and on file in my office.



In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of February, in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the said United States the one hundred and seventy-fourth.

[Seal]      /s/ ALEXANDER M. BELL,  
Clerk.

[Endorsed]: Filed May 15, 1950.

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[Title of District Court and Cause.]

## RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

### I.

That the person hereinafter called "the petitioner" on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent, E. B. Swope, as warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment, duly and regularly issued in criminal cause numbered C. 116/211 by the District

Court of the United States for the Southern District of New York on the 16th day of March, 1944, and transfer order dated the 27th day of October, 1944, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

## II.

That heretofore petitioner filed an application for a writ of habeas corpus before this Honorable Court in case No. 29017-E, and in this case the petitioner's application was denied although after the order denying the application was entered, a supplemental order was entered which deemed the application as being denied without prejudice;

## III.

That in denying the petition for writ of habeas corpus in the aforesaid case No. 29017-E, United States District Judge Herbert W. Erskine entered the following order:

“In a previous memorandum opinion this Court denied a motion to dismiss this petition for a writ of habeas corpus; it was the opinion of this Court at that time that under the facts alleged in the petition the petitioner had been subjected to double punishment for a single offense, on the basis of the rule laid down in *Kerr v. Squier*, 151 F. (2d) 308, and *Johnston v. Logamarsino*, 88 F. (2d) 86. In his return to the order to show cause, the respondent

advanced several additional arguments in support of his contention that the writ of habeas corpus should not issue.

It is contended that the defense of double jeopardy which in essence is the petitioner's claim, cannot be raised in a habeas corpus proceeding. The decisions on this point, both in the Supreme Court and in the 9th Circuit are not in harmony.

See:

Ex parte Nielsen, 131 U. S. 176;

Ex parte Bigelow, 113 U. S. 328;

Kerr v. Squier, *supra*; and

Johnston v. Lagomarsino, *supra*.

All these cases allow the issue to be raised by habeas corpus petition.

In re Snow, 120 U. S. 274;

Kastel v. U. S., 30 F. (2d) 687;

Crapo v. Johnston, 144 F. (2d) 863.

The latter cases involve holding or dicta that the issue may not be raised by habeas corpus.

Remaley v. Swope, 100 F. (2d) 31, which poses the issue, but avoids a decision thereon.

It is unnecessary for this court to decide this question, however, since it is an agreement with respondent's further contention that the Court cannot look outside the record to determine whether or not there has been a violation of the constitutional prohibition against double jeopardy. Although no actual holdings to this effect have been brought to

the attention of this Court, courts have often implied that such is the rule.

Ex parte Nielsen, 131 U. S. 176, 183;

Kerr v. Squier, 151 F. (2d) 308;

McKee v. Johnston, 109 F. (2d) 273.

In the case at bar the only evidence as to the facts constituting the double jeopardy are those alleged in the petitioner's complaint or stated in the opinions of the 2nd Circuit in the de Normand and Oddo cases. Since a copy of pertinent portions of the transcript of the original trial have not been filed with this Court, and since the facts constituting the alleged double jeopardy do not appear in either the indictment or the judgment, this Court would have to look outside the record to determine the issue in favor of the petitioner.

It is, therefore, the opinion of this Court that the writ of habeas corpus be and it is hereby denied.

Dated: December 9th, 1949."

#### IV.

That the entire record of the proceedings in the above-mentioned case numbered 29017-E heretofore instituted by this petitioner is hereby referred to and incorporated herein as though set forth in full;

#### V.

That in his application for writ of habeas corpus on file herein, the petitioner seeks to avoid the legal principle which limits the function of the writ of habeas corpus to the traditional matters of jurisdiction, constitutional rights of a defendant, and the

legality of sentence, as set forth, among others, in the cases of

Sunal v. Large, 332 U. S. 174;  
U. S. ex rel Kulich v. Kennedy,  
157 F. (2d) 811;  
Knewel v. Egan, 268 U. S. 442;  
Goto, et al. v. Lane, 265 U. S. 393.

Wherefore, respondent prays that the petition for writ of habeas corpus herein be denied, and the order to show cause heretofore issued, discharged.

Dated: June 16, 1950.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ JOSEPH KARESH,  
Assistant United States Attorney, Attorneys for  
Respondent.

(Here follows Respondents' Memorandum of  
Points and Authorities.)

United States of America,  
Southern District of New York—ss.

I, William V. Connell, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the writings annexed to this certificate to wit: the indictment in the case of the United States vs. Kingdon William De-Normand, have been compared with their originals on file and remaining of record in this office; that

they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 30th day of September, in the year of our Lord one thousand nine hundred and forty-nine and of the Independence of the United States the One Hundred and seventy-fourth.

[Seal]      /s/ WILLIAM V. CONNELL,  
Clerk.

In the District Court of the United States for the  
Southern District of New York

C 116-211

THE UNITED STATES OF AMERICA,

vs.

KINGDON WILLIAM De NORMAND, Alias  
Willie Desmond, Alias Robert L. Long, JOSEPH ALFRED LaCASCIA, WILLIAM JOSEPH KING, alias "Kingy" and JOHN MUGAVERO,

Defendants.

### INDICTMENT

Theft of merchandise moving in Interstate Commerce and conspiracy so to do. (Title 18, Sections 409 and 88, United States Code).

Southern District of New York, ss: The Grand

Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from certain trailer trucks of the Rapid Motor Lines, Inc, of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part and which constituted an interstate shipment of freight from Park & Tilford Import Corporation, 543 West 43rd Street, New York City, to Park & Tilford Import Corporation, 171 Brewery Street, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 1,005 cartons of Park & Tilford liquors and 18 bundles of advertising display matter, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such cases made



and provided (Title 18, Section 409, United States Code).

### Second Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from Gordon O'Neill Company, 120 Sherman Avenue, Jersey City, New Jersey, to the Liquor Exchange, Inc., 506 Water Street, Bridgeport, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 200 cases of Baltimore Club Rye Whiskey, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).



## Third Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East Side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from Tiara Products Company, Inc., 95 Van Dam Street, New York City, to the Bacon Bottling Company, 37 Morris Street, Hartford, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 200 cases of Sweet Vermouth Wine, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

## Fourth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from Giani Company, Inc., 100 Hudson Street, New York City, to the Bacon Bottling Company, 37 Morris Street, Hartford, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 100 cases of Sherry and Muscatel wine, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code.)

#### Fifth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New

York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from the Trieste Importing Company, 105 Hudson Street, New York City, to Armando Mauro, 768 Grant Avenue, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 50 cases of tomato puree, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

#### Sixth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Des-

mond, alias Robert L Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from the Trieste Importing Company, 105 Hudson Street, New York City, to Alfredo Amealola, 98 Wooster Street, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 10 cases of tomato puree, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

#### Seventh Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L Long, Joseph Peter Oddo, alias Anthony J Donato, Joseph Alfred LaCascia,

William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from the Trieste Importing Company, 105 Hudson Street, New York City, to America V. Baccelli, 172 Davenport Avenue, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 5 cases of tomato puree, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

#### Eighth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wil-

fully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from the Trieste Importing Company, 105 Hudson Street, New York City, to Salvatore Balsoon, 24 Jones Street, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 2 cases of Marsalla Tonic, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

#### Ninth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of November, 1943, and thereafter up to and including the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly conspired, combined, con-



federated and agreed together and with divers other persons whose names are to the Grand Jurors unknown, to commit divers offenses against the United States, that is to say, to violate Section 409, Title 18, United States Code, in the manner and by the means hereinafter described.

It was part of said conspiracy that at the time and place aforesaid, the said defendants would unlawfully, wilfully and knowingly and with intent to convert the same to their own use, steal, take and carry away, from certain trucks of the Rapid Motor Lines, Inc., of New Haven, Connecticut, when parked on 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels moving as and part of and constituting interstate shipments of freight.

#### Overt Acts

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, and John Mugavero had a conversation with one Edward Wagner at a bar and grill in the vicinity of 31st Street and 3rd Avenue, New York City.

2. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this

Court, on or about the 12th day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, met one Edward Wagner at the Holland Diner, southeast corner of Spring and Hudson Streets, New York City.

3. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 26th day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, had a conversation in a Plymouth car, License No. NY1C5712, parked in front of the Holland Diner, located at the southeast corner of Spring and Hudson Streets, New York City.

4. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 29th day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, met at the northeast corner of 17th Street and 8th Avenue, New York City.

5. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 29th day of November, 1943,



the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, were present near the intersection of Christopher and Greenwich Streets, New York City, and had a conversation with unknown men in a Plymouth car, bearing License No. NY3C5012.

6. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 30th day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, were present at the intersection of Christopher and Greenwich Streets, New York City.

7. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 30th day of November, 1943, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, were present at a diner located on the northeast corner of 22nd Street and 10th Avenue, New York City.

8. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this

Court, on or about the 1st day of December, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, had in their possession loaded revolvers.

9. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, William Joseph King, alias "Kingy," Joseph Peter Oddo, alias Anthony J. Donato, and Joseph Alfred LaCascia, with drawn revolvers, approached one Pasquale Nicholas Cimino and John Thomas Fiak.

10. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, William Joseph King, alias "Kingy," Joseph Peter Oddo, alias Anthony J. Donato, and Joseph Alfred LaCascia forced Pasquale Nicholas Cimino and John Thomas Fiak into the garage of the Rapid Motor Lines, Inc., located at 229 Tenth Avenue, New York City.

11. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943,

the defendant John Mugavero entered the garage of the Rapid Motor Lines, Inc., located at 229 Tenth Avenue, New York City.

12. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, put a loaded revolver to the back of Pasquale Nicholas Cimino.

13. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant William Joseph King, alias "Kinky" bound and gagged one Pasquale Nicholas Cimino.

14. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant William Joseph King, alias "Kinky" bound and gagged one John Thomas Fiak.

15. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant William Joseph King, alias "Kinky" said to one John Thomas Fiak that they were not in that business for the fun of it.

16. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero placed one John Thomas Fiak in a truck parked in the garage of the Rapid Motor Lines, Inc.

17. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero placed one Pasquale Nicholas Cimino in a truck parked in the garage of the Rapid Motor Lines, Inc.

18. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendants William Joseph King, alias "Kingy" and Joseph Alfred LaCascia were seated in a Plymouth car bearing License plate 3C5012.

19. In further pursuance of said conspiracy and

to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendants William Joseph King, alias "Kingy" and Joseph Alfred LaCascia each had in his possession a loaded revolver.

20. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant John Mugavero had in his possession an empty metal adhesive plaster roll.

21. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant Joseph Peter Oddo, alias Anthony J. Donato, had in his possession an empty metal adhesive plaster roll.

22. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, had in his possession a forged F.B.I. credential.

Against the peace of the United States and their dignity and contrary to the form of the statute of

the United States in such case made and provided (Title 18, Section 88, United States Code).

/s/ JAMES B. M. McNALLY,  
United States Attorney.

A true bill.

/s/ [Indistinguishable]  
Foreman.

Filed Jan. 12, 1944. U. S. District Court, S. D. of N. Y.

1944

Jan. 14—All five defendants plead Not Guilty. Bail \$20,000 as to each. Remanded. Jacob M. Offenbender assigned as counsel. Defts. LaCascia and King. Henry W. Goodard, D. J.

Jan. 31—Henry K. Chapman, Esq. assigned to deft. Kingdon W. DeNormand, Leibell, D. J.  
Before: Simon H. Rifkind, D. J.

Feb. 29—Trial Begun.

Mar. 1—Trial Continued.

Mar. 2—Trial Continued.

Mar. 3—Trial Continued.

Mar. 6—Trial Continued.

Mar. 7—Trial Continued. Govt. Rests.

Defts. DeNormand and Mugavero move to dismiss each of counts 1 to 9 incl.—Denied  
Exc.

Defts. Oddo, King & La Cascia move for dismissal of the Indictment—Denied—  
Exc.

Mar. 8—Trial Continued.

Mar. 9—Trial Continued and Concluded (All defts. renew motions for the dismissal of the Indictment and for the direction of a verdict in their favor. Denied—Exc.)

Verdict: All Defendants Guilty as charged. 3/16/44—for sentence: Defendants remanded. (D.) E.T.D.

Mar. 16—Motions as to all defendants.

Motion to set aside verdict. Denied. Exception. (D.)

Motion in arrest of judgment. Denied. Exception.

Mar. 16—All defts. sentenced. See Judgments filed. Rifkind, J.

[Endorsed]: Filed June 16, 1950.



United States District Court for the Northern Dis-  
trict of California, Southern Division

No. 29753

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of June, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Herbert W. Erskine,  
District Judge.

E. B. SWOPE, WARDEN, U. S. PENITEN-  
TIARY, ALCATRAZ, CALIFORNIA,  
Respondent and Appellant,

vs.

JOHN MUGAVERO,

Appellee.

ORDER THAT CASE BE PLACED ON CALEN-  
DAR FOR JULY 10, 1950, FOR HEARING  
OF MOTION TO STRIKE. ORDER OF SUB-  
MISSION VACATED

On motion of Joseph Karesh, Esq., Assistant United States Attorney, ordered submission set aside and case placed on calendar for July 10, 1950, for hearing on motion to strike.



[Title of District Court and Cause.]

## MOTION TO STRIKE

Comes now the Respondent, E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, and moves to strike from the petition for writ of habeas corpus herein certain immaterial and redundant matter identified below.

### I.

Paragraphs VII, VIII, IX, and X of said petition for writ of habeas corpus, and more particularly petitioner's Exhibit B referred to in paragraph X hereinabove mentioned, comprise evidentiary and immaterial matters. For these reasons, the foregoing paragraphs and exhibit should be stricken from the said petition.

### II.

That portion of paragraph XI of said petition at page 4, line 31, beginning with the words "That is," and continuing through the words "Truck 3," at line 2 of page 5, together with the following words at lines 4 and 5 of page 5 "they covered the other merchandise on Truck 4," for the reason that the foregoing allegations comprise immaterial matter and are evidentiary in character, and thus should be stricken from the said petition.

### III.

That portion of paragraph XIV of said petition at page 5, line 28, beginning with the words "that if petitioner" and continuing through the words "not

otherwise;”, at line 31 of page 5, for the reason that the foregoing allegation comprises immaterial material and is evidentiary and argumentative in character, and thus should be stricken from the said petition.

Dated: July 13, 1950.

Respectfully submitted,

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ JOSEPH KARESH,

Assistant United States Attorney, Attorneys for  
Respondent.

## POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

The petitioner raises the allegation of double jeopardy. If there has been such jeopardy, it must appear upon the face of the record. Petitioner in his application for writ of habeas corpus seeks to circumvent this rule by incorporating in the said application certain evidentiary, immaterial and redundant matter. It is this matter which is the subject of respondent's motion to strike. As authority for such motion to strike, respondent relies on his memorandum here-

tofore filed with his return to order to show cause.

Dated: July 13, 1950.

Respectfully submitted,

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ JOSEPH KARESH,  
Assistant United States  
Attorney.

[Endorsed]: Filed July 13, 1950.

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[Title of District Court and Cause.]

### ORDER

It Is Hereby Ordered that the motion to strike filed herein by Respondent shall be deemed to have been filed contemporaneously with the return to order to show cause heretofore filed herein by the said Respondent.

Dated July 13th, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed July 13, 1950.

In the District Court of the United States for the  
Northern District of California, Southern Division

No. 29753

JOHN MUGAVERO,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary,  
Alcatraz, California,

Respondent.

### ORDER GRANTING WRIT

The writ of habeas corpus is hereby granted for the reasons set forth in the earlier memorandum opinion filed September 23, 1949, denying respondent's motion to dismiss, and on the additional authority of *Clawans v. Rives*, 104 F. (2d) 240, subsequently brought to the attention of this Court, on the issue of the propriety of habeas corpus to test the claim of double jeopardy. Petitioner will remain in custody, however, pending appeal from this order by respondent.

Dated: July 31st, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed July 31, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that E. B. Swope, Warden, of the United States Penitentiary, Alcatraz, California, respondent herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Northern District of California, made and entered in the above-entitled proceedings on July 31, 1950, granting writ of habeas corpus.

Dated: August 1, 1950.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ JOSEPH KARESH,

Assistant United States Attorney, Attorneys for  
Respondent.

[Endorsed]: Filed August 1, 1950.

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the Respondent-Appellant herein may have to and including the 28th day of October, 1950,

to file the record on appeal herein, in the United States Court of Appeals for the Ninth Circuit.

Dated: September 5th, 1950.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed September 5, 1950.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL UNDER RULE 75 (a)

E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, respondent-appellant herein, hereby designates the complete record and proceedings in the above-entitled cause, together with all exhibits, and the complete record and proceedings in the cause entitled "John Mugavero v. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California," Civil Number 29017-E, together with all exhibits, for inclusion in the record on appeal, the same to include therein the following:

In Case No. 29017-E

- (1) Petition for Writ of Habeas Corpus together with exhibits attached thereto;
- (2) Order to Show Cause;
- (3) Motion to Dismiss Petition for Writ of Habeas Corpus;

(4) Traverse to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus;

(5) Memorandum Opinion of United States District Judge Herbert W. Erskine, filed September 22, 1949;

(6) Order Granting Respondent Time Within Which to File Return and Supporting Memorandum;

(7) Return to Order to Show Cause, together with exhibits attached thereto;

(8) Petitioner's Traverse to Respondent's Supplementary Proceedings;

(9) Order of United States District Judge Herbert W. Erskine Denying Petition for Writ of Habeas Corpus, filed December 9, 1949;

(10) Motion for an Order to Grant a Rehearing, etc.;

(11) Motion for Permission to Supplement Record;

(12) Minute Order Granting Rehearing Herein, entered March 27, 1950;

(13) Order Vacating Order Granting Motion for Rehearing, entered by United States District Judge Herbert W. Erskine, on May 10, 1950.

In Case No. 29753

(1) Petition for Writ of Habeas Corpus, together with all exhibits;

(2) Return to Order to Show Cause, together with all exhibits;

(3) Minute Order of June 26, 1950;

(4) Minute Order of June 27, 1950;

(5) Order of United States District Judge Herbert W. Erskine, with relation to Respondent's Motion to Strike, filed July 13, 1950;

(6) Respondent's Motion to Strike;

(7) Order of United States District Judge Herbert W. Erskine Granting Writ, filed July 31, 1950;

(8) Notice of Appeal;

(9) Order Extending Time to Docket, entered by United States District Judge Louis E. Goodman on September 5, 1950;

(10) This Designation of Contents of Record;

(11) Clerk's Certificate.

Dated: October 16th, 1950.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ JOSEPH KARESH,

Assistant United States Attorney, Attorneys for  
Respondent-Appellant, E. B. Swope, Warden,  
United States Penitentiary, Alcatraz, Cali-  
fornia.

[Endorsed]: Filed October 16, 1950.



In the District Court of the United States, in and for  
the Northern District of California, Southern  
Division

No. 29017-E

JOHN MUGAVERO,

Petitioner,

vs.

E. B. SWOPE, WARDEN, U. S. PENITENTI-  
ARY, ALCATRAZ, CALIF.,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS  
AD SUBJICIENDUM

To the Honorable, the District Court, for the  
above-said district.

The petition of John Mugavero, petitioner herein,  
and to be quoted hereafter as the petitioner, will re-  
spectfully show:

I.

That your petitioner is unlawfully restrained of his  
liberty by E. B. Swope, Warden of the United States  
Penitentiary at Alcatraz Island, California; that the  
body of your petitioner, the said E. B. Swope and  
the said United States Penitentiary at Alcatraz Is-  
land, California, are all, and each of them is, within  
and subject to the jurisdiction of this Court.

Jurisdictional Statement

Jurisdiction is conferred on this Court by Article  
1, Section 9 of the U. S. Constitution, sections 451 et

seq., 2241 and 394 of Title 28, U.S.C.A. to hear, grant and issue a Writ of habeas corpus ad subjiciendum.

That your petitioner is in custody under or by color of Authority of the United States; that he is in custody for an act done in pursuance of an Act of Congress, And judgment of a Judge of the United States; that he is in custody in violation of the Constitution of the United States; that it is necessary to bring your petitioner into Court under the provisions of a writ of habeas corpus ad subjiciendum and under the provisions of Section 394 of T. 28 U. S. C. A. for which your petitioner wishes to plead and manage his own case as such latter act of Congress provides and grants a Movant; that your petitioner's Co-defendant has filed a petition in the trial court which was ineffective; that the legal portion of your petitioner's sentence, that is to say a seven year sentence, was completed under the provisions of Section 710 of T. 18 U.S.C.A., on or about April 20, 1949; that Article 1 Section 9 of the Constitution, which grants: "the privilege of the Writ of Habeas Corpus shall not be suspended, \*\*\*," this is preeminent over Section 2255, of T. 28 U.S.C., and all such sections and clauses therein. U. S. v. Wong Kim, 169 U. S. 649, 655; Ex parte Grossman, 267 U.S. 80, 108; Dimick v. Schiedt 293 U. S. 474, 478.

### Statement of Facts

The factual situation is not complicated but necessitate being set out in length in order to show the true cause for the foregoing petition.

On November 30, 1943, petitioner et al., met near

a terminal of the Rapid Motor Lines, Inc., an interstate carrier of freight, for the purpose of putting into execution their previously arranged plan to take two truck loads of liquor. Petitioner was accompanied by a man named Stegman, whom was thought to be a confederate but was working in conjunction with agents of the Federal Bureau of Investigation.

Inside the terminal building were two loaded trucks of whiskey referred to as truck 3 and truck 4. Truck 3 was a canvas top truck without seals; it contained in Part Only the merchandise involved in counts one and two of the indictment.

Truck 4 was a completely closed truck with locked doors and contained the merchandise involved in counts 3 to 8 inclusive plus part of the merchandise involved in count one. Two employees of the Rapid Motor Lines arrived at the terminal and took such forementioned trucks 3 and 4 and parked them on the street and went to a restaurant to eat. Later as these employees started to approach these trucks, 3 and 4, they were held up and forced to enter the terminal, where they were left bound. Petitioner et al., walked from the terminal and were arrested by the federal agents.

However, the federal agent informer had driven away truck 3. (Truck 4 was not Approached, Moved or its Merchandise Molested in any Respect.)

Petitioner was found guilty on all nine counts of the indictment. Each of the first eight counts was based on Sec. 409 of T. 18 U.S.C.A., and charged that the defendants, "Unlawfully, wilfully and knowingly did steal, take and carry away from "Certain

trailer trucks'' of the Rapid Motor Lines goods belonging to various shippers or consignees. The ninth count charged conspiracy to violate section 409.

Petitioner received a sentence of 12 years. A five year sentence being imposed for the offense set out in Count one and two such sentences to be served concurrently. A five-year sentence being imposed for the offenses set out in Counts 3 to 8, inclusive. These latter sentences to be served concurrently but cumulative to the sentences imposed on Counts one and two. Also a sentence of two years was imposed for violating of count 9, the conspiracy count and to be served cumulative to all other sentences.

The essence of this petition is based on this fact:

Count one charged "the theft from certain trailer trucks of an interstate shipment of freight from Park and Tilford Import Corporation, consisting of 1005 cases of whiskey."

At the trial it was proved that 590 of such cases were in one truck, referred to as truck 3 (the truck the Government agency informer moved), and 415 cases in another truck referred to as truck 4.

Note this latter truck (truck 4), was not moved nor its merchandise molested in any respect. However, this has no bearing on this petition.

Each of counts 3 to 8 charged the theft from a "certain trailer truck" of an interstate shipment of freight from a named consignor to a named consignee.

"The proof showed (and cannot be contested by the Government) that all the merchandise

mentioned in counts 3 to 8, as well as 415 cases of the Park and Tilford whiskey mentioned in count one was in truck 4.”

The petitioner concedes the sentence imposed on count nine is valid and the sentence imposed on counts one and two. Thus, a seven-year sentence.

### Law Involved

The original proceedings of petitioner’s trial court was appealed (U. S. v. De Normand et al., 149 F. 2d. 622). However, it was not called to the trial court judge’s attention, nor to the superior court’s attention, that it was necessary to have possession of trucks 3 and 4 both, in order to complete the offense set out in count one. But the court ruled regarding truck 4 that the defendants had constructive possession of such truck which was sufficient. And in order to hold thus it was necessary to rule that: “We believe that the language should be construed as though it read (Sec. 409) ‘whoever shall steal or unlawfully take (or) (adding a word) carry away or conceal\*\*\*, with intent to convert to his own use.’” (149 F. 2d. 622 at p. 624). Therefore the point herein raised was not called to the forementioned court’s attention.

One of petitioners co-defendants did raise the facts herein set out in the trial court and appealed to the Second Circuit Court of Appeals in Oddo vs. U. S. 171 F. 2d. 854. This Court held thus:

“The question whether the stealing of the goods of different owners at one time and place constitutes several offenses or only one has been

much mooted in the courts and has produced divergent answers.”

To support their opinion they rested their conclusion on the opinion reached in, but, much disapproved case of *U. S. vs. Beerman*, 24 Fed. Cas. 1065. But such court frankly admits there are many cases that take the opposite view. (171 F. 2d. 854 at p. 858.)

### Law of This Circuit

The Circuit Court for the Ninth Circuit has reached an opposite view from the Second Circuit. Specifically so in *Johnston vs. Logomarsino*, 88 F. 2d 86; and *Kerr vs. Squire*, 151 F. 2d. 308.

### Contention

That it is the contention of your petitioner and he alleges that the crime charged against your petitioner in the aforesaid indictment constitutes but a single sentenceable offense; that the trial court, after entering the sentence of five years on count 1 of said indictment, exhausted its power and authority to impose a sentence on the other counts of said indictment and that said sentences so imposed on said counts are null and void; (Count nine excepted) that your petitioner has fully and completely served this sentence on said first and ninth count, and the continued detention and imprisonment of your petitioner subjects him to more than one punishment in the Federal courts for the same crime.

### Prayer

Wherefore, to be relieved of said unlawful deten-



tion, restraint and imprisonment, as aforesaid, your petitioner prays that this petition for a Writ of Habeas Corpus ad Subjiciendum be granted, heard and issued and that this Court make its order directing the aforesaid E. B. Swope, Warden, respondent herein, to appear before this Honorable Court, with the body of your movant, at a time and place to be set forth, to show cause, if any he has, why the foregoing petition should not be granted and a Writ of Habeas Corpus ad Subjiciendum should not be issued and your petitioner not be discharged as prayed.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner in Propria Persona, Alcatraz Island,  
California.

United States of America,  
State of California,  
County of San Francisco—ss.

John Mugavero, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and knows its contents; that the same is true of his own knowledge except as to those matters which are herein stated upon his information or belief and as to those matters he believes it to be true.

/s/ JOHN MUGAVERO,  
Petitioner.



Subscribed and sworn to before me this 28th day of June, 1949.

[Seal]                      N. F. STUCKER,  
Act. Associate Warden of U. S. Penitentiary, Alcatraz Island, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that John Mugavero is a citizen of the United States.

[Endorsed]:    Filed July 20, 1949.

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[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that E. B. Swope, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 1st day of August, 1949, at the hour of 10 o'clock a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated:    July 21st, 1949.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]:    Filed July 21, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR WRIT  
OF HABEAS CORPUS

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz Island, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and moves this Honorable Court to dismiss the Petition for Writ of Habeas Corpus on the following grounds:

1. Said Petition fails to show that petitioner has filed a motion in the trial Court to vacate, set aside, or correct the sentence heretofore imposed against him as required by Title 28 U.S.C.A., Section 2255.

2. Said Petition fails to state a cause of action upon which relief can be granted.

Dated: August 8, 1949.

/s/ FRANK J. HENNESSY,  
United States Attorney,

/s/ JOSEPH KARESH,  
Assistant United States  
Attorney,  
Attorneys for Respondent.

(Attached are Memorandum of Points and Authorities).

[Endorsed]: Filed August 8, 1949.

[Title of District Court and Cause.]

TRAVERSE TO RESPONDENT'S MOTION TO  
DISMISS PETITION FOR WRIT OF HA-  
BEAS CORPUS AD SUBJICIENDUM

Comes now the petitioner John Mugavero, and will respectfully show this Honorable Court the petition for writ of habeas corpus ad sujiciendum should be granted and issued as heretofore prayed.

I.

First, it should be noted petitioner invoked the privilege granted by Section 394 of T. 28 U.S.C. now Section 1654 of T. 28 U.S.C.A., which plainly states:

“In all courts of the United States the parties may plead and conduct their cases personally\*\*\*.” (Sec. 1654, T. 28).

This Section is referred to in petitioner's Jurisdictional statement and petitioner wishes to invoke the power granted him therein. Thus, to be present and conduct his own case.

II.

The learned counsel for the Respondent quotes Section 2255 of T. 28 U.S.C., (P. 2) and states such section has not been complied with.

This position is untenable and his arguments bonded on this contention are unsound and void of merit for two reasons, among others.

First, the pertinent part of this section to the present case reads:

“\*\*\*Unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”

Petitioner stated in his jurisdictional statement that his co-defendant (imprisoned herein, Alcatraz) had filed a petition in the trial court, predicated on the contention herein which was ineffective. (*Oddo vs. U. S.*, 171 F. 2d. 854).

From this decision (*Oddo vs. U. S. supra*), it shows beyond question “that the remedy by motion is inadequate and ineffective,” as to your petitioner.

Second: Since waiting the decision of his co-defendant, your petitioner has satisfied the legal portion of his sentence under the opinion of the Ninth Circuit Court. (*Johnston vs. Logomarsino*, 88 F. 2d. 86).

If petitioner applied to the trial court for an opinion on the point raised herein, such court would rule *res judicata* under the *Oddo vs. U. S.* case *supra*, irrespective of the opinions reached by the Ninth Circuit Court of Appeals in several recent cases.

Thus, it is manifest such section cannot be made to apply to the present case.

### III.

Respondent States at P. 1

“Said petition fails to state a cause of action upon which relief can be granted.”

## Regarding a Cause of Action

If the legal portion of a judgment has been served and further imprisonment on such judgment is a violation and infringement on the United States Constitution, and it is so shown by decisions of the Ninth Circuit Court that the legal portion of such sentence has been served, this should be ample to show cause of action.

## IV.

Respondent quotes *U. S. vs. De Normand et al.*, 149 F. 2d. 622 (p. 2) and states "the contention of petitioner was decided adversely to him on appeal from his judgment of conviction."

Again Respondent's attorney inadvertently overlooked the fact that the contention raised in the petition for habeas corpus was not before the court in the *De Normand* case *supra*. This is shown in a short perusal of the *Oddo vs. U. S.* case *supra*.

Further in Respondent's brief we find at p. 2:

"\*\*\*That there is no merit to this contention goes without saying\*\*\*."

(This pertains to what was before the appellate court on the original appeal.)

If the court should adopt this as their opinion, then they are being misled by the counsel for the Respondent. (See *Oddo vs. U. S.* *supra*), and in addition it would be theoretically adopting an opinion that is in conflict with the Ninth Circuit Court's rulings in *Johnston vs. Lagomarsino* 88 F. 2d. 86; *Dimenza vs. Johnston* 130 F. 2d. 465. And *Kerr vs. Squire* 151 F. 2d. 308.

We will go further and show there is merit in the contention raised by the habeas corpus petition by quoting a small part of Second Circuit Courts opinion in Oddo vs. U. S. case supra.

P. 856: "The question whether the stealing of the goods of different owners at one time and place constitutes several offenses or only one has been much mooted in the Courts and has produced divergent answers."

This question was decided favorably to petitioner's in the Logomarsino case supra, among others.

The Second Circuit Court says very frankly that: "Probably at least as many cases can be found which take the opposite view" (p. 857).

Inasmuch as the Ninth Circuit Court has taken the opposite view to the Second Circuit, shows there is merit in petitioner's contention and certainly shows a cause of action.

Wherefore your petitioner prays that the petition for writ of habeas corpus ad subjiciendum be granted and this Honorable Court enter its order to the Respondent herein to have your petitioner present so he may personally conduct his own case and that such petition be issued and petitioner discharged as prayed.

Dated this 17th day of August, 1949.

Respectfully submitted,

/s/ JOHN MUGAVERO,  
Petitioner In Propria  
Persona.

United States of America,  
County of San Francisco,  
State of California—ss.

John Mugavero, being duly sworn, deposes and says: That he has read the foregoing traverse and knows the contents thereof, and that the same is in all respects true.

/s/ JOHN MUGAVERO,  
Petitioner.

Sworn to before me this 17th day of August, 1949.

[Seal]       /s/ P. MADIGAN,  
Associate Warden,  
U. S. Penitentiary,  
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that John Mugavero is a citizen of the United States.

[Endorsed]: Filed August 18, 1949.



In the United States District Court of the Northern  
District of California, Southern Division

No. 29017-E

JOHN MUGAVERO,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitenti-  
ary, Alcatraz, California,

Respondent.

JOHN MUGAVERO,

In propria persona.

FRANK J. HENNESSY,

United States Attorney.

JOSEPH KARESH,

Assistant United States Attorney,

Postoffice Building,

San Francisco 1, California,

Attorneys for respondent.

Erskine, District Judge.

### MEMORANDUM OPINION

This is a petition for a writ of habeas corpus. An order to show cause was issued, whereupon respondent replied with a motion to dismiss the petition on the following grounds:—

1. That petitioner has not filed a motion in the

trial court to vacate the sentence imposed as per 28 USCA 2255;

2. That the petition fails to state a cause of action upon which relief can be granted.

(1) Necessity for Motion to Trial Court.

Section 2255 of Title 28 does require such motion to the trial court before a habeas corpus petition will be heard, with the following exception, which is the last clause of section 2255: “. . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.” Therefore the question is whether such remedy would be adequate or effective in the instant case.

Petitioner alleges correctly that his co-defendant filed such a petition in the trial court predicated upon the same grounds advanced herein by petitioner. This motion was denied by the trial court, upheld by the Circuit Court of the 2nd Circuit in the case of *Oddo v. United States*, 171 F. (2d) 854, a decision which, as will be pointed out below, seems contrary to the decisions of the 9th Circuit on the point. Thus, it seems logical to conclude that a motion by petitioner to the trial court would be ineffective.

The applicability of this last clause of Section 2255 has apparently risen in only two cases. In *St. Clair v. Hiatt*, 83 F. Supp. 585, petitioner had not complied with the requirement of motion to the trial court prior to bringing of the writ of habeas corpus. However, prior to the effective date of the statute, the petitioner had carried on correspondence with

the trial judge, which the latter declared he would treat as a motion to correct the sentences. No appeal was taken from the decision of the trial judge not to correct said sentences. Nevertheless the Court hearing the habeas corpus petition held that there was sufficient compliance with Section 2255.

The most analogous case to the present one is *Stidham v. Swope*, 82 F. Supp. 931, in which Judge Denman of the Ninth Circuit Court of Appeals granted the petition for the writ despite the failure of the petitioner to move the trial court to vacate the sentence, holding that such a motion was inadequate and ineffective to test the legality of petitioner's detention. He based this holding on the fact that the petitioner in Alcatraz was 1500 miles from the sentencing court, with the attendant expense, time and trouble involved in the motion and the consequent appeal, whether or not the petitioner was personally removed back to the locale of the sentencing court, and on the fact that the case could be much more summarily disposed of in San Francisco, since the Warden at Alcatraz was easily available. Judge Denman was undoubtedly influenced by the fact the petitioner in that case apparently had valid grounds for asking for release. With that factor in mind it is probably correct to state that the question of whether a motion to the sentencing court would be effective or not depends to a large extent upon our conclusions as to the substantive merits of the petitioner's case.

## (2) Substantive Basis for Petition.

Unfortunately, in his petition for dismissal, re-

spondent has chosen to rest his case primarily on the issue of the necessity of motion to the sentencing court, and discusses the substantive issue only to the point of citing *United States v. de Normand*, 149 F. (2d) 622, which was the original appeal by petitioner from his judgment of conviction. This, however, does not meet the main objection of petitioner, which is that the decisions of the 9th Circuit are contrary to those of the 2nd Circuit, which decided the *de Normand* case, and also the case of *Oddo v. United States*, 171 F. (2d) 854, brought by petitioner's co-defendants, where the exact point under consideration here was decided adversely to the petitioner.

The facts underlying this petition are somewhat as follows.

Petitioner was indicted and convicted on nine separate counts. Count 1 charged the theft from "certain trailer trucks" of an interstate shipment of freight consisting of 1005 cases of whiskey. At the trial it was proven that 590 of such cases were in one truck, called truck #3, and 415 in another truck, called truck #4. Counts 3 to 8 charged the theft from "a certain trailer truck" of an interstate shipment of freight consisting of numerous cases of wine, tomato juice, and so forth. The proof showed that all of the merchandise in counts 3 to 8 were in truck #4. Count 9 charged a violation of the conspiracy statute. Petitioner was convicted on all counts, and was sentenced to 5 years for count 1 and 5 years for counts 3 to 8, and 2 years for count 9, to run consecutively. It might be here noted that truck

#4 was a completely closed truck with locked doors.

Petitioner argues here, as did the petitioner in the identical case of *Oddo v. United States*, *supra*, that since count 1 covered the goods in truck #3 plus some of the goods in truck #4, and since, therefore, possession actual or constructive of truck #4 was necessary in order to convict under count #1, as found in *United States v. de Normand*, *supra*, there was no additional criminal act for which he could be convicted, and that the imposition of the additional five years under counts 3 to 8 was a second sentence for the same offense. In substance, the contention is that a thief who steals a vehicle and its contents commits but one theft, even though the vehicle contains packages of different kinds of goods belonging to different owners.

As the Court pointed out in *Oddo v. United States*, *supra*, the question whether the stealing of the goods of different owners at one time and place constitutes several offenses or only one has been much mooted in the courts and has produced divergent answers. That court, the 2nd Circuit, could discover no controlling Supreme Court authority, and decided that counts 3 to 8 charged offenses separate from the crime charged in count 1. The reasoning of that court is based primarily upon the following quoted paragraph:—

“The test of the identity of offenses, when double jeopardy is set up, is whether the evidence sustaining one indictment or count would have proved the other indictment or count. (Citing cases) Proof that the appellant

feloniously took possession of the 415 cases of whiskey belonging to Park & Tilford Corporation in truck #4 and involved in count 1 would not have proved that he feloniously took possession of the different merchandise of different ownership specified in counts 3 to 8." (171 F.(2d) 854 at 857)

However, it appears that the court overlooked the important fact that truck #4 was a locked truck and was never moved or tampered with. Therefore, if, as was determined, the petitioner had possession of truck #4 and the 415 cases of whiskey involved in count 1, how could it be held that he did not at the same time and place have felonious possession of the remainder of the merchandise in truck #4? Evidence to support a finding of possession of truck #4 and of the 415 cases, will also prove possession of the rest of the merchandise, enumerated in counts 3 to 8.

Turning from the facts, for a moment, and the logical difficulties in the opinion of the 2nd Circuit, to the cases in the 9th Circuit, it seems that the latter are contrary, at least in theory, to the Oddo case. Thus in *Kerr v. Squier*, 151 F. (2d) 308, it was held that three separate counts, charging theft of three mail bags from a post office, justify but one 5 year sentence, and require discharge on habeas corpus of the defendant who had served a five-year sentence on one of such counts, the trial court having found that the bags were simultaneously taken in one transaction. Again in *Johnston v. Logomarsino*, 88 F. (2d) 86, it was held that a taking of



three letters in a simultaneous and single transaction constitutes a single offense, and the petitioner was ordered released upon the service of the first of three sentences for the taking of the letters.

It is difficult for me to distinguish the present case from the reasoning in those two 9th Circuit cases; it would follow that in the instant case there was not only one transaction, but only one act which could not be divided into separate offenses. Since petitioner has served a period of time equal to the sentence imposed for counts 1 and 9, my opinion is that the respondent's petition to dismiss should be denied, without prejudice to respondent's right to more fully answer the substantive contentions of the petitioner.

Dated: September 22nd, 1949.

/s/ HUBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed September 23, 1949.



[Title of District Court and Cause.]

ORDER GRANTING RESPONDENT TIME  
WITHIN WHICH TO FILE A RETURN  
TO ORDER TO SHOW CAUSE, AND MEM-  
ORANDUM OF POINTS AND AUTHORI-  
TIES IN SUPPORT THEREOF

On Motion of Joseph Karesh, Assistant United States Attorney, attorney for the Respondent, and good cause appearing therefor,

It Is Hereby Ordered that the Respondent herein may have to and including October 10, 1949, within which to file the Return to Order to Show Cause and Memorandum of Points and Authorities in Support Thereof.

Dated: September 29, 1949.

/s/ HUBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed September 30, 1949.

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[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein shows as follows:

I.

That the person hereinafter called "the petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent, E. B. Swope, as warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment, duly and regularly issued in criminal cause numbered C. 116/211 by the District Court of the United States for the Southern District of New York on the 16th day of March, 1944, and transfer order dated the 27th day of October, 1944, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That attached hereto and made a part hereof as "Exhibit A" are the following:

(1) Certified copy of indictment in said criminal cause numbered C. 116/211 returned against the said petitioner and Kingdon William DeNormand, Joseph Peter Oddo, et al.;

(2) Certified copy of judgment and sentence and warrant of commitment in the case of United States v. John Mugavero, criminal cause numbered C. 116/211;

(3) Certified copy of docket entries in the case of United States v. John Mugavero, Kingdon Wil-

liam DeNormand, Joseph Peter Oddo, et al., criminal cause numbered C. 116/211;

(4) Certified copy of election of petitioner to enter upon service of sentence in said criminal cause numbered C. 116/211;

(5) Copy of transfer order, as aforesaid;

(6) Copy of record of court commitment No. 642-AZ, United States Penitentiary, Alcatraz, California;

### III.

That the contentions advanced by the petitioner in his application for writ of habeas corpus on file herein were also in substance urged by him on appeal from his judgment of conviction before the United States Court of Appeals for the Second Circuit, and decided adversely to him, in *United States v. DeNormand, et al.*, 149 Fed (2d) 622, certiorari denied 326 U.S. 756, rehearing denied 326 U.S. 808, rehearing denied 326 U.S. 811, rehearing denied 327 U.S. 816, certiorari denied 330 U.S. 822, rehearing denied 330 U.S. 854; that the aforesaid decision in the United States Court of Appeals for the Second Circuit is hereby referred to and incorporated herein as though set forth in full; that in an opinion involving codefendants of the petitioner herein, in *Oddo v. United States*, and *United States v. DeNormand*, 171 Fed. (2d) 854, 856, the United States Court of Appeals for the Second Circuit, in a footnote, corrected an erroneous statement which it had made in reliance on briefs of counsel in *United*

States v. DeNormand, et al., 149 Fed. (2d) 622 at page 625;

Wherefore, respondent prays that petition for writ of habeas corpus herein be denied, and the order to show cause heretofore issued, discharged.

Dated: October 12th, 1949.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ JOSEPH KARESH,  
Assistant United States  
Attorney,  
Attorneys for Respondent.

[Endorsed]: Filed October 12, 1949.

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[Title of District Court and Cause.]

PETITIONER'S TRAVERSE TO RESPOND-  
ENT'S SUPPLEMENTARY PROCEEDINGS

To the Honorable Court:

Comes now the petitioner John Mugavero and enters this traverse to respondent's Supplementary Proceedings and will show:

I.

That petitioner filed for writ of habeas corpus ad subjiciendum in July, 1949. Show cause issued to be returned on August 1, 1949. Respondent filed a Motion to Dismiss August 8th, 1949. The court rendered a decision on September 22, 1949.

II.

The Court subsequently entered an order grant-

ing the respondent further time, thus to October 10th, 1949, to supplement their Petition to Dismiss.

However respondent failed to file such return until October 12th, two days late.

### III.

Respondent has now filled the Court with unnecessary records, that have no bearing on the points involved.

### IV.

The contention raised in the petition for habeas corpus was not before the Circuit Court in *United States v. De Normand* 149 F. 2d 622.

### V.

That the point raised by petitioner was tacitly and correctly set out by the Court in its "Memorandum Opinion." And such contention adhered to by the Honorable Court, with the Authorities quoted in which the court predicated their opinion and decision.

### VI.

That petitioner wishes to incorporate this Honorable Court's Memorandum Opinion as though fully set out herein and to be made a part of this latter proceedings.

Wherefore petitioner prays the petition for writ of habeas corpus ad subjciendum be issued and he be discharged as prayed, without further delay.

Dated: October 18th, 1949.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner in propria persona.

[Title of District Court and Cause.]

PETITIONER'S POINTS AND AUTHORITIES IN SUPPORT OF PETITION, IN OPPOSITION TO RESPONDENT'S RETURN

The petitioner herein, seeks by habeas corpus, and shows herein that it is a proper proceeding in which to raise the point here at issue, and further sets out ample authorities in which to predicate his contention on and to support an order to discharge as heretofore prayed.

I.

Respondent first quotes in his return at P. 1, of his brief:

“Remaley v. Swope, 100, F. 2d 31-33.”

The writer herein cannot see the significance of quoting this decision to the case at bar. We will take only one (others would be cumulative) of these cases herein quoted and show what United States Supreme Court holds on a point as raised by petitioner.

Thus, we read in *ex parte Neilsen*, 131 U. S. 176;

“\* \* \* The first question to be considered, therefore, is whether, if the petitioner's position was true, that he had been convicted twice for the same offense, and that the court erred in its decision, he could have relief by habeas corpus. The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction, which

could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule, which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, whether because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void, and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the case of *ex parte Lange*, 18 Wallace, 163 and *ex parte Siebold*, 100 U. S. 371 and in several other cases referred to therein. \* \* \*

The rule above as stated by the United States Supreme Court, has been, in substance, enunciated in this Circuit in the recent cases of *Kerr V. Squier*, 151 F. 2d 308; *Dimenza v. Johnston*, 130 F. 2d 465, and *Johnston v. Logomarsino*, 88 F. 2d 86 among others. Obviously the foregoing shows that a petition for habeas corpus is a proper proceeding in the instant case and further authorities would be cumulative.

## II.

At page two (2) of the Respondent's brief the Respondent raised the issue of records and says:

"The law seems to be that in such a collateral proceeding the court can not look outside of the face of the record to determine whether



or not there has been a violation of (this) his constitutional guarantee.”

It would seem that Rule 27 of the Federal Rules of Criminal Procedure for the District Courts of the United States, has been over looked by the Respondent where we find:

Rule 27: Proof of Official Record:

“An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in Civil Actions.”

The Civil Actions rules provides and holds that the records as referred to by petitioner are clearly proper and can be used by this Honorable Court as it has used them. (Rule 44 of C.P.R.)

As was said in *re Nielsen*, *supra*. The Supreme Court says:

“It is true that in the case of *Snow* we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or elsewhere in the record (of which the judgment is only a part), it is sufficient. \* \* \*”

### III.

At page 3 of respondent's brief we find:

“Assuming *arguendo*, that this court could properly inquire into the evidence before the trial court as reflected in the opinion of the Appellate Court, respondent nonetheless asserts that the petition for writ of habeas corpus should be denied.”

The petitioner herein understands it to be a rule

of law, that the law or Court is bound by their Appellate Court decisions.

In the Kerr case *supra* the Ninth Circuit Court released the petitioner Kerr on a habeas corpus proceedings which had raised the double jeopardy issue and the same result occurred in the case of *Johnston v. Logomarsino, supra*.

In the case of *Dimenza v. Johnston*, 130 F. 2d 465, the Ninth Circuit held in this case:

Dimenza having a four count indictment. Three of the counts charged as assault on different person. A five-year sentence was imposed on each count to run consecutively.

However, on a habeas corpus proceeding which maintained that three sentences were imposed for one offense, thus an infringement on the double jeopardy clause of the Fifth Amendment, the Circuit Court was in full accord, thereby releasing the defendant after serving the valid portion of one of the Assault Counts.

What additional proof or decisions is it necessary to show the counsel for the respondent that petitioner has raised a proper question and in a proper form fully supported by the Appellate Court.

True, the point at issue was raised at one time before the Second Circuit Court in *Oddo v. U. S.*, 171. F. 2d 854, and such court said in one place of their decision:

“The question whether the stealing of the goods of different owner’s at one time and

place constitutes several offenses or only one has been much mooted in the courts and has produced divergent answers.” (P. 856.)

When the Second Circuit Court states this to be a much mooted question. It should be sufficient to cause this court to make inquiries and construe their answer to be in conformity with the Appellate Court decision of this Circuit. The following cases also are in harmony to the Ninth Circuit Court’s rulings:

Chanock v. U. S.,

267 F. 612;

Henry v. U. S.,

263 F. 459;

Braden v. U. S.,

8 Cir., 270 F. 411, among others.

#### IV.

It is also noted by government’s brief at p. 5, that because it is Section 409 of T. 18, U.S.C., violated a different interpretation should be placed upon this particular section.

Why should this Section (409) be loosely construed to cover many crimes and all other sections strictly construed?

It is a maxim of criminal law that all criminal Statutes shall be strictly construed.

#### Note

Petitioner might further add, upon release from the U. S. Penitentiary, be that when it may, he still

will have eleven (11) calendar years to serve in the New York State Penitentiary.

Wherefore, it is respectfully submitted, that the sentence imposed on counts three to eight are in excess of the law; that only one offense was committed and a valid sentence was imposed for such offense which has been fully served.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner in propria persona.

[Endorsed]: Filed October 19, 1949.

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[Title of District Court and Cause.]

### ORDER

In a previous memorandum opinion this Court denied a motion to dismiss this petition for a writ of habeas corpus; it was the opinion of this Court at that time that under the facts alleged in the petition the petitioner had been subjected to double punishment for a single offense, on the basis of the rule laid down in *Kerr v. Squier*, 151 F. (2d) 308, and *Johnston v. Logomarsino*, 88 F. (2d) 86. In his return to the order to show cause, the respondent advanced several additional arguments in support of his contention that the writ of habeas corpus should not issue.

It is contended that the defense of double jeopardy, which in essence is the petitioner's claim, cannot be raised in a habeas corpus proceeding. The

decisions on this point, both in the Supreme Court and in the Ninth Circuit are not in harmony.

See:

Ex parte Nielsen,

131 U. S. 176;

Ex parte Bigelow,

113 U. S. 328;

Kerr v. Squier, *supra*; and

Johnston v. Logomarsino, *supra*.

All these cases allow the issue to be raised by habeas corpus petition.

In *re* Snow, 120 U. S. 274; *Kastel v. U. S.*, 30 F. (2d) 687; *Crapo v. Johnston*, 144 F. (2d) 863.

The latter cases involve holding or dicta that the issue may not be raised by habeas corpus.

*Remaley v. Swope*, 100 F. (2d) 31, which poses the issue, but avoids a decision thereon.

It is unnecessary for this court to decide this question, however, since it is an agreement with respondent's further contention that the Court cannot look outside the record to determine whether or not there has been a violation of the constitutional prohibition against double jeopardy. Although no actual holdings to this effect have been brought to the attention of this Court, courts have often implied that such is the rule.

Ex parte Nielsen,

131 U. S. 176, 183;

Kerr v. Squier,

151 F. (2d) 308;

McKee v. Johnston,

109 F. (2d) 273.

In the case at bar the only evidence as to the facts constituting the double jeopardy are those alleged in the petitioner's complaint or stated in the opinions of the 2nd Circuit in the de Normand and Oddo cases. Since a copy of pertinent portions of the transcript of the original trial have not been filed with this Court, and since the facts constituting the alleged double jeopardy do not appear in either the indictment or the judgment, this Court would have to look outside the record to determine the issue in favor of the petitioner.

It is, therefore, the opinion of this Court that the writ of habeas corpus be and it is hereby denied.

Dated: December 9th, 1949.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed December 9, 1949.

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[Title of District Court and Cause.]

MOTION FOR AN ORDER TO GRANT A RE-  
HEARING IN PETITION FOR WRIT OF  
HABEAS CORPUS AND TO PERMIT THE  
FILING OF SUBSTANTIATING EVI-  
DENCE

To The Honorable Judge Erskine:

Comes now the petitioner in Case No. 29017-E,  
and respectfully moves this Honorable Court for an  
order granting a Rehearing in petition for Writ of

Habeas Corpus and to permit the filing of a Record to substantiate same.

### I.

An order denying the petition for writ of Habeas Corpus was entered on December 9, 1949. The petition for writ of habeas corpus stated petitioner had been convicted and sentenced twice for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Petitioner incorporated the opinion of the Circuit Court for the Second Circuit to support the double jeopardy contention.

However, this Court held and ruled such is not sufficient and proper to base a petition for writ of habeas corpus on. For such reason, among others, petitioner prays for a Rehearing.

### II.

The Ninth Circuit Court has recently held in their opinions that a defendant that has been subjected to double punishment for a single offense can raise such point in a petition for Writ of Habeas Corpus. *Kerr vs. Squier*, 151 F. (2d.) 308;

*Dimenza vs. Johnston*, 130 F. (2d.) 465, and *Johnston vs. Logomarsino*, 88 F. (2d.) 86.

Such being the rule and law as stated and held by the Ninth Circuit Court of Appeals, we now come to the crucial point of such petition.

“Can this Court accept the official opinion of the Second Circuit Court of Appeals as part of the official record?”



Inasmuch as a petition for writ of Habeas Corpus is a Civil Action, the Rules of Civil Procedure controls. Thus, Rule 44 of such rules we find:

“(a) Authentication of copy. An official record or an entry therein, when admissable for any purpose, may be evidenced by an official publication thereof\*\*\*.”

“(c) Other proof. This does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by an applicable statute or by the rules of evidence at common law.”

In addition to the foregoing, petitioner will attack the evidence given verbatim by Mr. Martin Roche the dispatcher for the Rapid Motor Lines, who was responsible for the loading of the trucks involved. And the one who stated that 590 cases of whiskey (that were charged in the first count), was in truck or box 3, and 415 cases of whiskey (that were also charged in the first count), was in truck or box 4.

Also the pertinent parts of the two truck drivers, John Thomas Fiak who was to drive truck or Box No. 4, and Pasquale Nicholas Cimino, who was to drive truck or Box No. 3.

John Thomas Fiak stated that as both he and Cimino got to the truck, where they both were held up.

Also indictment and judgment and commitment.

The attached transcript of evidence was taken from the original trial court record and presented

to the Second Circuit Court on direct appeal. Petitioner will certify in the proper place such is an authentic copy of the evidence presented at petitioner's trial.

### III.

To restate in part the Supreme Court's opinion in the case of *ex parte Neilson*, 131 U. S. 176, we find:

“\* \* \* It is true that in the case of *Snow* (120 U. S. 274) we laid emphasis on the fact that double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or elsewhere in the record of which the judgment is only a part it is sufficient.”

The foregoing taken as a whole should be sufficient to sustain the petition for writ of habeas corpus.

In conclusion we call this Honorable Court attention to Supreme Court's opinion regarding a petition that was drafted by one of the prisoners of Alcatraz where we read:

P. 1017 of 61 Sup. Ct. 1015. “\* \* \* A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice.” *Holiday v. Johnston* 313 U. S. 342, 61 Sup. Ct. 1015.

(Prayer)

Wherefore petitioner herein prays this petition for rehearing be granted; that the evidence attached

be fully considered, and that the petition for Writ of Habeas Corpus be issued as prayed for.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner, in propria persona.

### Oath of Verification

State of California,

County of San Francisco—ss.

The petitioner herein John Mugavero, being first duly sworn and says: that the foregoing is all the truth as he knows it; that the attached evidence of Mr. Martin Roche, and the partial evidence of Mr. Pasquale Nicholas Cimino and Mr. John Fiak, is a true copy of the trial court minutes as presented in the original appeal to the Circuit Court of Appeals for the Second Circuit; that petitioner sincerely believes he is entitled to the redress as herein prayed for.

/s/ JOHN MUGAVERO,

Petitioner in propria persona.

Subscribed and sworn to before me this 19th day of December, 1949.

[Seal] /s/ P. MADIGAN,

Associate Warden of U. S. Penitentiary, Alcatraz Island, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that John Mugavero is a citizen of the United States.

[Endorsed]: Filed December 21, 1949.

[Title of District Court and Cause.]

MOTION FOR PERMISSION TO SUPPLEMENT RECORDS TO A MOTION FOR AN ORDER TO GRANT REHEARING IN PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judge Erskine:

Comes now the petitioner John Mugavero and respectfully moves this Honorable Court for permission to add to the record in the Motion for re-hearing to Writ of Habeas Corpus.

That attached hereto are the following:

(1) Certified (partial) copy of the testimony of Mr. Martin Roche, Dispatcher for Rapid Motor Lines Co.;

(2) Certified Copy of the first 10 pages of Mr. John Thomas Fiak, driver of truck or Box No. 4. (Sealed Truck.)

I.

Mr. Martin Roche's Testimony will show that 590 cases of whiskey of the 1005 cases as charged in Count 1, were placed in Box No. 3, (Open Truck) and 415 cases placed in Box No. 4 (Sealed Truck).

Dated on the 8th day of February, 1950.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner, in propria persona.

The Court: Call your next witness.

Mr. Hilly: John Fiak.

JOHN THOMAS FIAK

called as a witness on behalf of the Government,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Hilly:

Q. How old are you, Mr. Fiak? A. 25.

Q. Married? A. Yes.

Q. Have you any children? A. Two.

Q. Have you ever been convicted of any crime?

A. No.

Q. What is your occupation?

A. Interstate truck driver.

Q. And by whom are you employed?

A. Rapid Motor Lines.

Q. What is the route that you drive for the  
Rapid Motor Lines?

A. I start out at New Haven every night and  
come down to the New York terminal, pick up a  
truck in New York and go back to New Haven.

Q. Where is the New York terminal located?

A. On Tenth Avenue between 23rd and 24th.

Q. Would you just keep your voice up a bit, Mr.  
Fiak.

On November 30th of 1943, did you leave or did  
you drive a truck from the New Haven terminal to  
New York? A. Yes.

Q. At about what time did you leave the New  
Haven terminal? A. About 8:30.

Q. And about what time did you arrive in New York?      A. About 11:30.

Q. What did you do, sir, when you arrived in New York?

A. I parked the truck directly in front of the terminal and I went and opened the doors—shut off the burglar alarm and opened the large door and just as I got in to pull my truck out, the other driver pulled up across the street with his truck from New Haven.

Q. Another driver from New Haven pulled up across the street with his truck.

A. That is right.

Q. What did you do after you had the doors open?

A. I pulled my truck out across the street.

Q. Where did you park it?

A. On the east side of Tenth Avenue, facing north.

Q. I show you Government's Exhibits 18 and 19 in evidence and ask you which one is your truck (handing to witness)?      A. This one.

The Court: The closed one or the open one?

Q. The closed truck or the open truck?

A. The closed one.

Mr. Hilly: Referring to Government's Exhibit 18 in evidence.

Q. Now what happened when you pulled out Government's Exhibit 18 in evidence out of the terminal?

A. When I pulled mine out Cimino had just

pulled up across the street and he pulled in his, the truck he brought in from New Haven.

Q. And then what happened?

A. And then he pulled his out that was loaded for New Haven.

Q. I show you Government's Exhibit 19 in evidence and ask you if that is the truck——

A. That is right.

Q. ——that Cimino pulled out (handing to witness)?           A. Yes, sir.

Q. Did you see where he drove it to?

A. Well, there wasn't enough room directly across from the terminal so he parked it on Tenth Avenue between 24th and 25th, facing north.

Q. What did you do when Cimino pulled his truck out?

A. Well, when he pulled his out he pulled his back in that he drove in from New Haven, the truck that he had brought in from New Haven.

Q. Yes.

A. (Continuing): And then we closed the large doors, set the burglar alarm and closed the small door.

The Court: The trucks you had brought from New Haven were both empty?

The Witness: No, they were both loaded.

The Court: Both loaded?

The Witness: Yes, sir

Q. And after you had closed the terminal and set the burglar alarm, what did you do?

A. We walked right to the corner in a restaurant and had a cup of coffee.



Q. When you say "we" you mean you and Cimino?      A. Yes.

Q. What is the name of the restaurant?

A. Imperial Foods, I think it is.

Q. And how long were you in the restaurant?

A. Oh, about 10 or 15 minutes at the most.

The Court: Where is the restaurant?

The Witness: It is right on the corner of 23rd and Tenth.

Q. What did you do after you had your cup of coffee with Cimino?

A. Then we both walked out together and we started walking over toward my truck, because that was the nearest because the restaurant, and I took the flashlight out of my pocket and shone it on the back doors to see if the seals were all right on it, and then I shone it on the back doors, and just as I did that a couple of fellows came walking over toward me.

Q. Did you have a conversation with these fellows?

A. I didn't have much chance. The leader, one fellow——

Mr. Reiss: I move to strike it out.

The Court: Strike it out.

Did you have any conversation—yes or no?

The Witness: No.

The Court: All right.

Q. Did they say anything to you?

A. They told me to turn around and march towards the garage.

Q. Do you see in court any of the men who ap-

proached you on that occasion?      A. Yes, sir.

Q. Where are they?

A. Sitting right over there. (Indicating.)

Q. Pardon me?      A. Sitting over there.

Q. Will you stand up and tell us which men sitting over there you saw?

A. Well, I saw the first fellow in the seat there with the eyeglasses.

Mr. Hilly: Will your Honor direct the reporter to indicate on the record that this witness has identified the defendant DeNormand.

The Court: So ordered.

A. (Continuing): And that fellow sitting right next to him.

Mr. Hilly: And also the defendant King.

The Court: It will be so ordered.

A. (Continuing): That's all.

Q. Did you notice anything in their hands?

A. Well, I noticed DeNormand had a gun and King had a gun.

Q. Where was Cimino at this time?

A. Well, he was standing right next to me towards the middle of the street. I was standing towards the curb on the north side, and he was standing more towards the middle of the street.

Q. Did the defendant DeNormand say anything to you as he approached you?

A. Yes. He told us to turn around and march toward the garage and he said, "I guess you know what we are here for."

Q. What happened then when he told you to do that?

A. Well, I just turned around and marched.

Q. You and Cimino? A. That is right.

Q. What happened then?

A. Well, King stuck a gun in my back and DeNormand stuck one in Cimino's back and Cimino was a little ahead of me and he reached the garage doors before I did, and DeNormand asked him to open up the garage doors, and he tried to tell him that he wasn't very familiar with it and DeNormand made some sort of a remark which I don't exactly remember, the exact words to it, but it was in some sense, "You son-of-a-bitch, you had better open up the door and not let the alarm ring." So I tried to explain to DeNormand that he wasn't familiar with the door, that I try to turn the alarm off. So rather than stir them any more, because they were threatening us to a certain extent, I shut the alarm off——

Mr. Packer: I move to strike it out.

The Court: I will order the jury to disregard the phrase "they threatened us."

Tell us only the conversation.

Q. Tell us what they said.

A. Well, as we were walking across the street King told me if I didn't do as I was told I guess I would know what was good for me. So then I opened—Cimino opened the doors and I shut off the burglar alarm and we got inside the garage.

Q. What happened after you shut off the burglar alarm?

A. We were both pushed inside and just as we got inside one of the trucks pulled away.

Q. Then what happened, Mr. Fiak?

A. They told us to march toward the back of the garage.

Q. Toward the back of the garage?

A. That is right.

Q. And then what happened?

A. They told us to get up on the platform and not turn around.

Q. I show you a picture and ask you if you can tell me what this represents (handing to witness)?

A. That is the platform. That is the back of the garage.

Q. Of the Rapid garage?            A. That is right.

Q. Is that the platform on which you were told to get up?            A. Yes, sir.

Q. Who told you to get up on that platform?

A. King.

Mr. Hilly: Will you mark this for identification, please, Mr. Clerk.

(Marked Government's Exhibit 26 for identification.)

The Court: We will take a recess at this point.

(Short recess.)

Q. (By Mr. Hilly): I show you this picture, Mr. Fiak, and ask you if you can tell me what that represents (handing to witness)?

A. That is the New York terminal on Tenth Avenue.

The Court: I can't hear a word.

Q. Keep your voice up?

A. That is our New York terminal on Tenth Avenue.

Q. Is that the terminal between 23rd and 24th Streets?      A. That is right.

Mr. Hilly: Will you mark this for identification, please.

(Marked Government's Exhibit 27 for identification.)

Q. I direct your attention to the lower lefthand corner of Government's Exhibit marked for identification and ask you what that is (handing to witness)?

A. That is the small door entrance where you shut off the burglar alarm.

Q. Is the burglar alarm visible?

A. Yes, sir.

Q. Where is it?

A. It is just inside the door, the lefthand side.

Q. And where is the big door?

A. It is the large door right here (indicating). It is an overhead door.

Q. What do you mean when you say "it is an overhead door"?

A. You pull it up by a chain and it just folds up over the top of the roof.

Mr. Hilly: At this time, if your Honor please, the Government offers in evidence Government's Exhibit 26 for identification and 27 for identification.

(Conference between Mr. Hilly and Mr. Packer off the record.)

Mr. Packer: No objection, if your Honor please. There is some extraneous—I am sorry, I did not want to talk out of turn.

(Conference among Court and counsel, at the bench, off the record.)

(Government's Exhibits 26 and 27 for identification received in evidence.)

Q. Did you get up on the platform?

A. Yes, sir.

Q. Where was Cimino at this time?

A. He was also up on the platform with me.

Q. What happened when you got up on the platform?

A. They told us to face the wall and not look around, and they started to tie us up.

Q. How were you dressed that night?

A. I had a gray overcoat on and a sweater and a pair of pants.

Q. Who tied you up?                   A. King.

Q. Pardon me?                   A. King.

Q. Did anyone help him?

A. Well, after I was—my eyes were already covered. I don't know if he finished the job or somebody else did it. I can't remember for sure who did it.

Q. Did you hear any conversation or anything—was anything said while you were being tied up?

A. Yes. After I was—my face was all plastered up I heard him talk to this fellow Oddo asking him to do different things.

Q. How were you tied up?

A. Well, they stuffed a hunk of gauze in my mouth and just wrapped adhesive tape from my chin to the top of my head.

Q. Did they put any gauze underneath the adhesive tape?           A. No, sir.

Q. Where was Cimino at that time?

A. He was standing right next to me.

Q. What happened then? In addition to putting gauze on your face was anything done with your hands?

A. Yes, they tied my hands in back of me with twine and then covered it with adhesive tape so that I wouldn't be able to untie the knots.

Q. Was anything done with your feet?

A. Yes; they started——

Mr. Reis: May it please the Court, I object to the question. Let him ask the witness everything that was done instead of leading.

The Court: All right. You are leading the witness.

Mr. Hilly: Very well, your Honor.

Q. What else was done, Mr. Fiak?

A. Well, they tied my feet together and then they told me to take a few steps forward and jump off the platform, that they would catch me.

Q. Did you do that?           A. Yes, sir.

Q. Did they catch you?           A. Yes, sir.

Q. What happened then?

A. And then they—I was able to take short steps. They told me to walk up back towards the garage again, and I got alongside of the truck that



I had brought down, they lifted me into the cab and tied me to the steering post.

Q. What happened then?

A. Well then, the fellow that was tying me up asked me if I had a knife and I nodded that I did not, so he walked away and came back after a few seconds and he untied my feet from the post and they lifted me out again and carried me toward the back of the garage.

Q. Then what happened?

A. Then they lifted me inside the body and I found Cimino there.

Q. Inside the body of what?

A. The trailer, the trailer that I brought down.

Q. You say you found Cimino in there?

A. Yes.

Q. How do you know that Cimino was in there? Weren't your eyes bandaged?

A. Well, he nudged me when I got in.

Q. Did he say anything?

A. No, he couldn't talk at the time because he was gagged, too.

Q. I show you this picture and ask you if you can tell me what that represents (handing to witness)?

A. That is the side door of the body that they put us inside.

United States of America  
Southern District of New York

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby

certify that the foregoing pages, numbered from 288 to 298, inclusive, contain true and complete copies of originals thereof on file in said Court, in the case of United States of America, Plaintiff-Appellee, against Kingdon William DeNormand, etc., Joseph Peter Oddo, etc., Joseph Alfred La Cascia, William Joseph King, etc., and John Mugavero, Defendants-Appellants, as the same remain of record and on file in my office.

In Testimony Whereby, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of February in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the said United States the one hundred and seventy-fourth.

[Seal]      /s/ ALEXANDER M. BELL,  
Clerk.

[Endorsed]: Filed February 10, 1950.

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United States District Court for the Northern  
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Mon-

day, the 27th day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Herbert W. Erskine,  
District Judge.

[Title of Cause.]

ORDER GRANTING PETITIONER'S  
MOTION FOR REHEARING

Petitioner's motion for rehearing having been heretofore submitted, and due consideration had thereon, It Is Ordered that said motion for rehearing be and the same is hereby granted.

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[Title of District Court and Cause.]

ORDER VACATING ORDER GRANTING  
MOTION FOR REHEARING

There being some question in the mind of the Court as to its jurisdiction to entertain a motion for rehearing filed more than ten days after the entry of its order denying petition for writ of habeas corpus,

It Is Hereby Ordered that the order granting the motion for rehearing be and the same is vacated and set aside.

The petitioner may file a new petition for writ of habeas corpus, the original order denying petition for writ of habeas corpus being hereby deemed denied without prejudice.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed May 10, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Petition for Writ of Habeas Corpus. Attached are Exhibits A and B.

Return to Order to Show Cause.

Minute Order of June 26, 1950. Order that case be placed on calendar for July 10, 1950, for hearing of Motion to Strike, Order of Submission vacated.

Motion to Strike.

Order that Motion to Strike filed herein shall be deemed to have been filed contemporaneously with the Return to Order to Show Cause.

Order Granting Writ.

Notice of Appeal.

Order Extending Time to Docket.

Designation of Contents of Record on Appeal.

In Case No. 29017

John Mugavero, Petitioner,

vs.

E. B. Swope, etc., Respondent

Petition for Writ of Habeas Corpus ad Subjiciendum.

Order to Show Cause.

Motion to Dismiss Petition for Writ of Habeas Corpus.

Traverse to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus ad Subjiciendum.

Memorandum Opinion.

Order Granting Respondent Time within which to file a Return to Order to Show Cause, and Memorandum of Points and Authorities in Support Thereof.

Return to Order to Show Cause.

Petitioner's Traverse to Respondent's Supplementary Proceedings.

Order Denying Petition for Writ of Habeas Corpus.

Motion for an Order to Grant a Rehearing in Petition for Writ of Habeas Corpus and to Permit the Filing of Substantiating Evidence.

Motion for Permission to Supplement Records to a Motion for an Order to Grant Rehearing in Petition for Writ of Habeas Corpus. Attached are 11 photostatic pages of Testimony of John Thomas Fiak.

Minute Order of March 27, 1950.

Order Granting Petitioner's Motion for Rehearing.

Order Vacating Order Granting Motion for Rehearing.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court this 19th day of October, A.D. 1950.

C. W. CALBREATH,  
Clerk.

[Seal] By /s/ M. E. VanBUREN,  
Deputy Clerk.

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[Endorsed]: No. 12717. United States Court of Appeals for the Ninth Circuit. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellant, vs. John Mugavero, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 19, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals for the Ninth  
Circuit

No. 12717

E. B. SWOPE, Warden, United States Peniten-  
tiary, Alcatraz, California,

Appellant,

vs.

JOHN MUGAVERO,

Appellee.

STATEMENT OF POINTS TO BE RELIED  
ON IN APPEAL AND DESIGNATION OF  
CONTENTS OF RECORD TO BE PRINTED

E. B. Swope, Warden of the United States Peni-  
tentiary, at Alcatraz, California, appellant herein,  
hereby designates the entire record filed with this  
Court as necessary for the consideration of the  
appeal, and the following constitute the points to  
be relied upon by him on appeal:

1. That the Honorable Herbert W. Erskine,  
United States District Judge for the Northern Dis-  
trict of California, should have denied the Petition  
for Writ of Habeas Corpus filed by appellee before  
him;

2. That the Honorable Herbert W. Erskine,  
United States District Judge for the Northern Dis-  
trict of California, erred when he ordered the ap-  
pellee discharged from the custody of the appellant;

3. That the Honorable Herbert W. Erskine,  
United States District Judge for the Northern  
District of California, erred in holding that the



allegations contained in appellee's Petition for Writ of Habeas Corpus were sufficient in law to justify the relief as prayed for in the said petition;

4. That the Honorable Herbert W. Erskine, United States District Judge for the Northern District of California, erred when he found that the appellee had suffered double punishment and been twice placed in jeopardy for the same offense;

5. That the Honorable Herbert W. Erskine, United States District Judge for the Northern District of California, erred in holding that the defense of double jeopardy is cognizable in habeas corpus;

6. That the Honorable Herbert W. Erskine, United States District Judge for the Northern District of California, erred when he looked outside the face of the record to determine whether the appellee had suffered double punishment and been twice placed in jeopardy for the same offense;

7. That the consecutive sentences imposed against the Appellee by the United States District Court for the Southern District of New York in Criminal Cause numbered C. 116/211 on the 16th day of March, 1944, totaling 12 years, constitute a valid existing judgment presently in full force and

effect, and justifiable cause for the present continued detention of appellee by appellant.

Dated: October 25, 1950.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ JOSEPH KARESH,  
Assistant U. S. Attorney,  
Attorneys for Appellant.

[Endorsed]: Filed October 25, 1950.